

United States
Circuit Court of Appeals
For the Ninth Circuit. 7

GRECO CANNING COMPANY, a Corporation,
Plaintiff in Error,
vs.

P. PASTENE & COMPANY, INCORPORATED,
a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED
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F. D. MONCKTON,
CLERK

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Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. THOMAS, BEEDY & LANAGAN,
Alaska Commercial Building, San Francisco,
Calif.,

Attorneys for Plaintiff.

JOHN L. McNAB, Esq., and C. C. COOLIDGE,
Esq., Nevada Bank Building, San Francisco,
Calif.,

Attorneys for Defendant.

In the District Court of the United States, in and
for the Ninth Judicial Circuit, Northern Dis-
trict of California, Second Division.

P. PASTENE & CO., INCORPORATED, a Cor-
poration,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

(Complaint.)

COMES NOW the plaintiff in the above-entitled
action, and for cause of action against the defendant
above named alleges:

I.

That the plaintiff P. Pastene & Co., Incorporated,
is and was at all the times herein mentioned a cor-
poration organized and existing under and by virtue
of the laws of the State of Massachusetts, and is a

citizen and resident of the said State of Massachusetts.

II.

That the defendant above named, Greco Canning Co., is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State of California, and of the Ninth Judicial Circuit, Northern District of California. [1*]

III.

That on or about the 13th day of May, 1916, the defendant above named made, executed and delivered to the plaintiff above named a contract, a true copy of which is annexed hereto and marked Exhibit "A."

IV.

That thereafter by agreement between the parties hereto, the contract hereinabove referred to, a true copy of which is attached hereto and marked Exhibit "A" was changed so that the defendant agreed to deliver 3,000 cases of Salsa De Pomodoro packed 200 tins to the case of six ounces each in wooden cases at \$3.50 per 100 tins, instead of 2,000 cases of Salsa De Pomodoro packed 200 tins to the case of six ounces each in wooden cases at \$3.50 per 100 tins, and 2,000 cases of Salsa De Pomodoro packed 100 tins to the case, six ounces each in fiber cases at \$3.50 per hundred tins.

V.

That thereafter and on or about the 2d day of

*Page-number appearing at foot of page of original certified Transcript of Record.

November, 1916, the defendant above named delivered to the plaintiff above named f. o. b. cars at San Francisco, California, 665 cases of Salsa De Pomodoro, 200 tins to the case of six ounces each in wooden cases. That the plaintiff has demanded the delivery of the remainder of the goods so contracted to be delivered to it, but defendant has failed, neglected and refused to deliver the same, or any part thereof.

VI.

That on the 1st day of December, 1916, and prior thereto, and ever since then, plaintiff has been able and ready and willing to pay for the goods upon delivery.

VII.

That the plaintiff has duly performed all the [2] conditions of the contract on its part to be performed.

VIII.

That on account of the failure, neglect and refusal of the said defendant to deliver to the plaintiff 2,335 cases of Salsa De Pomodoro packed 200 tins to the case of six ounces each in wooden cases at \$3.50 per hundred tins, plaintiff has been damaged in the sum of \$23,350.00.

WHEREFORE, plaintiff prays judgment against the said defendant in the sum of \$23,350.00, together with its costs of suit herein expended.

THOMAS, BEEDY & LANAGAN,

Attorneys for Plaintiff. [3]

Exhibit "A."

THE CRECO CANNING CO., of San Jose, California, hereinafter called seller, this day sold, and P. Pastene & Co., New York City, N. Y., hereinafter called buyer, this day bought the following described goods—1916 pack:

(2000)	Two	thousand	cases	Salsa	De	Pomodoro	packed	200	tins
(2000)	"	"	"	"	"	"	"	<u>100</u>	"

to	the	case	six	oz.	each,	in	wooden	cases	at	Three	Dollars	and
"	"	"	"	"	"	"	fiber	"	"	"	"	"

Fifty	cents	(\$3.50)	per	hundred	tins.
"	"	"	"	"	"

TERMS: The above-named goods are f. o. b. cars San Francisco less 1½% cash discount, Sight Draft Bill of Lading attached.

GUARANTEE: Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug Act, June 30, 1906: or the California Pure Food Act, March 11, 1907. Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers label. Quality to be of same consistency as the Imported, of good flavor and color. Samples for approval to be submitted prior to shipping and shipment to correspond with samples.

CONDITIONS: Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and [4] cease. Usual swell guarantee—viz—Seller guarantees swells not to exceed $\frac{1}{2}$ of 1%.

Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to protect draft against documents for invoice value on presentation. Seller agrees to store said goods and insure them at buyers expense, should buyer so desire, until December 1, 1916.

Seller: GRECO CANNING CO.

By V. V. GRECO,
Sec. and Treas.

Buyer: P. PASTENE & CO.,
By CHAS. A. PASTENE,
Pres.

Sweet Basil or Basilico.

One leaf of fresh Basil to be put in each tin, either on top or bottom of contents. [5]

United States of America,
Northern District of California,
State of California,
City and County of San Francisco,—ss.

Peter R. Pastene, being duly sworn, deposes and says: That he is an officer, to wit, the treasurer of P. Pastene & Co., Inc., a corporation, plaintiff in

the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

PETER R. PASTENE.

Subscribed and sworn to before me this 22d day of May A. D. 1917.

[Seal]

ANNE F. HASTY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 22, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

In the District Court of the United States in and for *the Judicial* Circuit, Northern District of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Demurrer.

Now comes the defendant and files this, its demurrer to the complaint of plaintiff on file herein, and demurs on the following grounds, to wit:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That said complaint is uncertain in the following particulars:

A. It appears from Exhibit "A" attached to and made a part of the complaint, that in case of a short pack, the seller agrees to make only a prorate delivery and it cannot be ascertained from the face of the complaint whether there was in fact a short pack or whether there was a prorate delivery only, in accordance with the terms of the contract; nor can it be [7] ascertained whether in fact there was a violation of the provisions of the contract or a compliance therewith.

B. It appears from the contract, Exhibit "A" made a part of the complaint, that if the seller should be unable to perform all its obligations under said contract by reason of strike, fire or other circumstances beyond its control, the obligations of the contract should cease and it cannot be ascertained from the complaint whether as a matter of fact the alleged failure of the defendant to deliver the goods called for by the contract was due to the excepted reasons in said contract, namely: to strike, fire or other circumstances beyond its control.

C. It is alleged in paragraph IV of the complaint that thereafter the agreement between the parties hereto, namely, the written contract attached to the complaint, was changed so that the defendant agreed to deliver 3,000 cases instead of 2,000 and

other changes were made, in accordance with Paragraph IV of the complaint, but it cannot be ascertained from the complaint how or in what manner the said changes were made and whether by oral agreement or by written contract, and if by written contract what other provisions were contained in said contract, and whether as a matter of fact the part performance alleged by the plaintiff was on the contract as changed or in its original form, or whether deliveries were made on the contract as amended, and if so how said amendment was made or executed and whether the changes alleged in paragraph IV of the complaint were the sole and only changes made in said contract and whether as a matter of fact the contract, added as Exhibit "A," contains the only duly executed contract between the parties. [8]

III.

Said complaint is ambiguous for the reasons set forth in paragraph II of this demurrer.

IV.

Said complaint is unintelligible, for the reasons set forth in paragraph II of this demurrer.

WHEREFORE defendant prays that this demurrer be sustained and that he be not required to answer the complaint.

J. L. McNAB,

Attorney for Defendant.

Dated July 5th, 1917.

I hereby certify that I am attorney for the defendant named in the foregoing action and named in the demurrer. That this demurrer is not filed for the

purpose of delay and that in my opinion it is well taken in point of law.

J. L. McNAB,
Attorney for Defendant.

[Endorsed]: Filed July 5th, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

At a stated term, to wit, the July Term, A. D. 1917,
of the Southern Division of the United States
District Court for the Northern District of Cali-
fornia, Second Division, held at the courtroom
in the City and County of San Francisco, on
Monday, the 9th day of July, in the year of our
Lord one thousand nine hundred and seventeen.
Present: The Honorable WILLIAM C. VAN
FLEET, District Judge.

No. 16,076.

P. PASTENE & CO.

vs.

GRECO CANNING CO.

**Minutes of Court—July 9, 1917—Order Overruling
Demurrer.**

Defendant's demurrer to the complaint came on to
be heard and no one appearing on behalf of the de-
fendant, it was ordered that said demurrer be, and
the same is hereby, overruled. [10]

In the District Court of the United States, in and
for the Ninth Judicial Circuit, Northern Dis-
trict of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corpo-
ration,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Answer.

Comes now the defendant in the above-entitled ac-
tion and answering the complaint of plaintiff on file
herein :

Admits that the contract made and entered into
between plaintiff and defendant is as set forth in
the Exhibit "A" annexed to plaintiff's complaint,
save and except in this :

Said contract was not made on the 13th day of
May, 1916, but was made and is dated at San Jose,
California, April 28, 1916.

Admits that the contract alleged in plaintiff's com-
plaint (and which was dated April 28, 1916, instead
of May 13, 1916, as alleged in plaintiff's complaint)
was changed so that the defendant agreed to deliver
3,000 cases of Salsa De Pomodoro, packed 200 tins to
the case of 6 ounces each, in wooden cases at \$3.50
per hundred tins, instead of delivering 2,000 cases
of Salsa De Pomodoro packed 200 tins to the case of

6 ounces each in wooden cases at \$3.50 per hundred tins, and 2,000 cases of [11] Salsa De Pomodoro packed 100 tins to the case, 6 ounces each in fiber cases at \$3.50 per hundred tins. Defendant alleges that said change was made for the plaintiff's convenience and was merely an alteration in the packing, the quality and quantity of content sold being the same as that provided in the contract; and defendant alleges that except as so modified said contract remained in all respects exactly as written between the parties thereto.

Admits that the plaintiff demanded the delivery of the remainder of the goods so contracted to be delivered to it and admits that the defendant did not deliver to the plaintiff more than 665 cases of Salsa De Pomodoro, 200 tins to the case of 6 ounces each in wooden cases, and defendant denies that it either failed, neglected or refused to deliver the same or any part thereof, save as specifically admitted herein, namely:

The defendant admits that it was unable to deliver more than 665 cases for the reason that there was during the year 1917 a short pack, and it was specifically provided in the contract between the plaintiff and defendant that in case of a short pack the seller (defendant) agreed to make a prorated delivery only. Defendant was further unable to deliver the whole of said product for the reason that there were other circumstances beyond the defendant's control preventing such delivery; that is to say, owing to severe climatic conditions, there was a failure of the tomato crop from which said Salsa De Pomodoro is pro-

duced and there were not sufficient tomatoes produced or which could be secured to supply the amount needed in said contract and the defendant alleges that it was and is provided in the contract between the plaintiff and defendant that if the seller (defendant) should be unable to perform all of its obligations under said contract, by reason of any circumstances [12] beyond its control, such obligation should at once terminate and cease. Defendant alleges that it complied with its contract in all respects, as limited by the provisions thereof, and there being a short pack the defendant, pursuant to the provisions of said contract, made a prorate delivery (and in excess of a prorate delivery) to the plaintiff and owing to the circumstances beyond defendant's control, to wit, the crop failure, defendant made a prorate delivery, but its obligations to deliver beyond said prorate delivery, terminated and ceased under the provisions of said contract. And defendant alleged that on delivering to the plaintiff its prorate delivery of said pack of 1917 the defendant notified the plaintiff of the reason for inability to deliver further under said contract and that it had complied with its contract, as hereinbefore alleged.

Defendant has no information sufficient to enable it to answer all of the allegations set forth in paragraph VI of plaintiff's complaint, and basing its answer on said ground defendant denies that on the 1st day of December, 1916, or prior thereto or ever since said date or at any time plaintiff has been able, ready or willing to pay for the goods on delivery or any other time.

Denies that on account of the failure, neglect and refusal or the failure, neglect or refusal of the said defendant to deliver to the plaintiff 2,335 cases of Salso De Pomodoro either packed in 200 tins to the case of 6 ounces each in wooden cases at \$3.50 per hundred tins, or any other quantity of Salso De Pomodoro, packed in any manner whatsoever, or for any other reason whatsoever, the plaintiff has been damaged in the sum of \$23,350.00 or any other sum whatsoever.

Denies that the plaintiff has suffered any damage whatsoever [13] on account of any act or omission by or on the part of this defendant either relating to the contract set forth in plaintiff's complaint or arising from any other fact, act or omission whatsoever.

And for a second, separate and further defense to plaintiff's complaint, defendant alleges:

That the contract entered into between the plaintiff and defendant contains the following clause:

“In case of a short pack seller agrees to make prorate delivery only.”

That there was a short pack for the year 1917, within the meaning of said contract: and there was not sufficient crop to furnish other than a short pack; and pursuant to the provisions of said contract, hereinbefore set forth, the defendant made to the plaintiff a prorate delivery of the pack of Salsa De Pomodoro produced by said defendant, and delivered in excess of a prorate delivery, owing to the inability to compute accurately, in advance, what would be an exact prorate delivery. That plaintiff

received under the provisions of the contract between plaintiff and defendant, in excess of its full prorate delivery as called for by said contract.

And for a third, further and separate defense to plaintiff's complaint, defendant alleges:

That the contract entered into between plaintiff and defendant contained the following clause:

“If seller should be unable to perform all its obligations [14] under this contract, by reason of a strike, fire or other circumstances beyond its control, such obligations shall at once terminate and cease.”

That severe climatic conditions during the season of 1917 caused a shortage and failure in the tomato crop and Salsa De Pomodoro is a product made from tomatoes; that such tomato crop shortage was a circumstance beyond defendant's control and defendant was unable to secure or procure tomatoes sufficient to fill its contracts and made prorate delivery to the extent of the tomato crop capable of being rendered into said Salsa De Pomodoro; that by virtue of said provision of said contract the obligations on the part of the defendant to furnish other than the prorate delivery terminated and ceased, and defendant was under no obligation to proceed beyond the said terms of said contract.

The defendant on delivering to plaintiff its prorate delivery notified the plaintiff of the circumstances and reason for inability to deliver further.

WHEREFORE defendant prays that plaintiff take nothing by this action; that it be adjudged and decreed that defendant has fully and completely

complied with the provisions of its contract and was not in default with regard to the delivery beyond the actual delivery so made by it; that plaintiff's action be dismissed and that the defendant have a dismissal in its favor together with its costs of action herein and for such other and further relief as shall be proper in the premises.

JOHN L. McNAB,

Attorneys for Defendant. [15]

United States of America,
Northern District of California,
State of California,
County of Santa Clara,—ss.

V. V. Greco, being first duly sworn, deposes and says: That he is an officer of the defendant corporation, to wit, the secretary thereof; that he has read the above and foregoing answer to plaintiff's complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein set forth on information or belief, and that as to those matters he believes it to be true.

V. V. GRECO.

Subscribed and sworn to before me this 23d day of August, 1917.

[Seal]

E. K. GARLIEPP,

Notary Public in and for the County of Santa Clara,
State of California.

Receipt of a copy of within answer is hereby admitted this 25th day of August, 1917.

THOMAS, BEEDY & LANAGAN,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 5, 1917. W. B. Maling,
Clerk. By J. A. Schaerter, Deputy Clerk. [16]

In the District Court of the United States, in and
for the Ninth Judicial Circuit, Northern Dis-
trict of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corpo-
ration,

Plaintiff,

vs.

GRECO CANNING COMPANY, a Corporation,
Defendant.

**(Stipulation and Order Waiving Jury and Placing
Cause on Calendar).**

IT IS HEREBY STIPULATED AND AGREED
by and between the parties hereto that the above-
entitled action may be placed on the term calendar
of the above-entitled court for the term commencing
the first Monday in March, 1919, and further, that a
jury be and it is hereby waived on the trial of the
above-entitled action.

Dated: February 27th, 1919.

THOMAS, BEEDY & LANAGAN,

Attorneys for Plaintiff.

JOHN L. McNAB,

Attorneys for Defendant.

So ordered.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Feb. 27, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

At a stated term, to wit, the July Term, A. D. 1920,
of the Southern Division of the United States
District Court for the Northern District of Cali-
fornia, Second Division, held at the courtroom
in the City and County of San Francisco, on
Saturday, the 30th day of August, in the year of
our Lord one thousand nine hundred and twenty.
Present: The Honorable WILLIAM C. VAN
FLEET, District Judge.

No. 16,076.

P. PASTENE & CO., INC.

vs.

GRECO CANNING CO.

**Minutes of Court—August 30, 1920—Order for
Judgment in Favor of Plaintiff.**

This cause heretofore tried and submitted being
fully considered and the Court having filed its opin-
ion, it is ordered that judgment be entered in favor
of plaintiff and against defendant in the sum of
\$5205.00 and for costs. [18]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Judgment.

This cause having come on regularly for trial upon the 16th day of December, 1919, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, James Lanagan, Esq., appearing as attorney for plaintiff and John L. McNab and C. C. Coolidge, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 17th, 23d and 30th days of December, 1919, and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its opinion and ordered that judgment be entered in favor of plaintiff and against defendant in the sum of \$5,205.00 and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the

Court that P. Pastene & Co., Incorporated, a corporation, plaintiff, do have and recover of and from Greco Canning Co., a corporation, defendant, the sum of Five Thousand Two Hundred Five and 00/100 (\$5,205.00) Dollars, together with its costs herein expended taxed at \$224.70.

Judgment entered August 30, 1920.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk. [19]

[Endorsed]: Filed Aug. 30, 1920. Walter B. Maling, Clerk. [20]

(Title of Court and Cause.)

(Opinion).

Filed August 30, 1920.

THOMAS, BEEDY & LANAGAN, of San Francisco, Attorneys for Plaintiff.

JOHN L. McNAB, of San Francisco, Attorney for Defendant.

VAN FLEET, District Judge.

Action to recover for breach of contract to manufacture and deliver three thousand (3,000) cases of Salsa De Pomodoro, or Italian tomato paste, in the crop season of 1916.

There was delivery under the contract of but six hundred and sixty-five (665) cases or about twenty-

two per cent (22%) of the quantity contracted for, and the action proceeds upon the theory that the plaintiff is entitled to recover upon the basis of a full and complete delivery of the quantity contracted for.

The defense is based on this provision of the contract; "In case of short pack, seller agrees to make prorated delivery. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire or other circumstances beyond its control, such obligations shall at once terminate and cease." The defendant's claim is, in substance, that there was a "short pack" within the meaning of the contract, resulting partly from a very considerable failure in the tomato crop by reason of weather conditions, and partly from trouble with defendant's processing appliances which caused great delay and difficulty; that by reason of these conditions defendant was compelled to make a [21] prorated delivery; that plaintiff received its full *pro rata* of the pack actually made, which was all it was entitled to. The different elements of this defense will be considered.

1. As to a failure of the crop, it is sufficient to say that the evidence, which is more or less conflicting, is not sufficient to sustain that feature of the defense—at least to any such extent as that claimed. There was evidence tending to show that early rains and frosts damaged the crop to some extent and thus decreased production, particularly in the Santa Clara Valley, the territory more immediately surrounding defendant's plant, but it was

not only very indefinite as to the real extent of the injury in that valley but wholly so as to the effect in other fields of production in adjacent counties where it appeared the tomato is largely grown; and there being nothing in the terms of the contract requiring that the goods contracted for be produced from tomatoes grown in any particular section, it was essential to sustain this defense, even had there been a more complete failure in the immediate field, to show that the fruit could not have been secured in other parts of the State in quantity to fulfill the contract. *Newall et al. vs. New Holstein Canning Co.*, 97 N. W. 487. The evidence discloses no such effort in this respect as would establish inability to get the fruit elsewhere or to excuse the failure to perform the contract to the great extent shown. To the contrary, I am satisfied that taking all the evidence into consideration and giving the defendant the benefit of every intendment and deduction making in its favor as to failure or damage to the crop, the Court would be wholly unwarranted in finding the defendant justified in abating more than twenty per cent (20%) from a full delivery under its contract. [22]

2. As to the delay and difficulty encountered by defendant from trouble with its paste making machinery, it is not and indeed could not well be seriously claimed that such a cause would ordinarily come within the definition of a "circumstance beyond its control" which would excuse performance by defendant within the terms of the contract. *Carnegie Steel Co. vs. United States*, 240 U. S. 156;

Morgan Lyall, 16 Quebec K. B. 562; Connorsville Wagon Co. vs. McFarlan Carriage Co., 166 Ind. 123; American Bridge Co. vs. Glenmore Distilleries Co., 107 S. W. 279; Vredenburgh vs. Baton Rouge Sugar Co., 28 Southern, 122. But the claim under this head is, first, that the custom in the packing business is to recognize such causes of delay as justifying a "short pack," and, second, that independently of this custom the parties themselves put that construction upon the contract and that the Court is bound thereby. But the evidence on the subject is too vague, unsatisfactory and conflicting to enable the Court to find the existence of any such custom. It tends strongly, to the contrary, to indicate that nothing is ordinarily regarded by the trade as justifying a "short pack" other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character. Nor do I think the evidence sustains the contention that the parties in their dealings have given the contract any such construction as that contended for. This claim is based solely upon certain passages occurring in the correspondence carried on during the time the goods were being processed. Quite early in the packing season the defendant wrote plaintiff of difficulties being encountered with the processing machinery which were causing delay and that by reason of that and because "the crop this year is very short as we [23] have had considerable rain which has caused much damage," it was predicted that the pack would be as low as twenty-five per cent (25%). In answer the plaintiff wrote express-

ing regret over the difficulties being encountered and disappointment at the prospect of a "short pack" and, expressing the hope that defendant would find conditions improving, said: "At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any case we shall expect a full *pro rata* delivery of all such goods as you are successful in producing."

There were later references in the correspondence to the same subject but none bearing more definitely on the question of a practical construction of the contract than those given. It is quite obvious that there was nothing in the suggestions made by plaintiff in reply to a recital by defendant of the difficulties encountered which could be seized upon as tending to show that plaintiff was giving the contract a construction in any respect differing from that its language would import. The defendant had mentioned to plaintiff, as one of the difficulties presenting itself, a short crop resulting from weather conditions, a thing which plaintiff would at once recognize as justifying or excusing a "short pack" under the very terms of the contract. The answer must be read, as does his next letter in which he makes reference to hearing that weather conditions had improved, as indicating that damage to the crop was what he had in mind in his suggestion about meeting defendant's situation "in reasonable

fashion.” Very clearly it cannot be construed as an acquiescence in any suggestion which may [24] be gathered from defendant’s letters that the latter was relying on the trouble with its machinery as justifying a “short pack.”

In construing acts or expressions of the kind relied on as constituting a construction by the parties of a written contract at variance with the ordinary import of its terms, it is a cardinal rule that “It ought to appear with reasonable certainty that they were acts of both parties done with knowledge and in view of a purpose at least consistent with that to which they are now sought to be applied.” *Sternbergh vs. Brock*, 225 Pa. 279, 287. Here the only information plaintiff had as to conditions confronting the defendant was what those conditions were represented to be by the latter and as to which, as we have seen, the failure of the crop was at least exaggerated. In this respect, therefore, the plaintiff is entitled to rely on the terms of the contract as written.

The further considerations urged by counsel as to the construction to be put upon the contract have not been overlooked but are regarded as inapplicable to its express terms.

The contract price, delivered by defendant f. o. b. cars San Francisco, was Seven Dollars (\$7.00) per case, and it is stipulated that the market price at the time and place of delivery was Ten Dollars (\$10.00) a case. In view of the foregoing considerations, plaintiff should have judgment in accord with those figures based upon a delivery of eighty

per cent (80%) of the quantity contracted for, less the quantity already delivered, and for its costs.

Judgment may be entered accordingly.

[Endorsed]: Filed August 30, 1920. Walter B. Maling, Clerk. [25]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

Before Honorable WM. C. VAN FLEET, Judge.

No. 16,076.

P. PASTENE & CO., Incorporated, a Corporation,
Plaintiff,

vs.

GRECO CANNING CO., a Corporation,
Defendant.

Statement of Evidence in Form of a Bill of Exceptions.

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In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

Before Honorable WM. C. VAN FLEET, Judge.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,
ration,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,
Defendant.

STATEMENT OF EVIDENCE IN FORM OF
BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above-entitled action came on for trial before the above-entitled court, Honorable William C. Van Fleet, Judge thereof, on the 16th day of December, 1919, James Lannigan, Esq., appearing as counsel for the plaintiff, and John L. McNab, Esq., and C. C. Coolidge, Esq., appearing as counsel for the defendant.

Prior to any evidence being taken in the case it was stipulated between counsel that the market price of the tomato paste involved in the action at the time and place of delivery was \$10 per case.

Thereupon counsel for the plaintiff, having stated that the answer admitted a failure to deliver and having pleaded as a defense: First, that there was a short pack; secondly, that the 665 cases delivered by the defendant to the plaintiff represented the prorata that the plaintiff was entitled to; and, third, that [27—1] circumstances beyond the control of

the defendant made it impossible to make a larger delivery, and the market price having been made the subject of stipulation, the plaintiff rested his case.

Thereupon Mr. McNab, counsel for the defendants, stated the following in the form of an opening statement: That the evidence will show that the product known as Salsa De Pomodoro is a highly concentrated extract of the tomato and that prior to 1916 it was not known as a domestic product within the United States; that it had prior to that time been exclusively imported from Italy, and that during the war an embargo was placed upon its importation from Italy, and that therefore there was a derth of the product here. That the plaintiff Pastene came to California, and the defendant Greco, president of the Greco Canning Company, entered into the contract in question after Mr. Pastene had visited the defendant's plant and discussed the matter with him. That it was necessary in order to produce this product that machinery should be installed for that purpose. The Greco Plant, the evidence will show, up to that time had been engaged in the manufacture of canned tomatoes and tomato sauce as their exclusive products. That this company then added this Salsa De Pomodoro as a side line. That the defendant immediately procured the only machinery manufactured in the United States for the purpose of producing this product, that is, the only standard machinery, and put it in with competent and capable engineers, and commenced the manufacture of all three products. That the defendant

operated this machinery to the limit of its capacity, it being machinery that was supposed to be capable of producing the entire quantity called for by his contracts. That the machinery failed to operate continuously; that it would choke owing to the fact [28—2] that it was new machinery and never theretofore used; that it was operated by capable engineers continuously night and day during the entire season; and that working night and day with capable engineers they did produce a certain quantity of this product. That various contracts had been entered into by the defendant to distribute this product; and that when the season was concluded and the frost came on that destroyed the rest of the crop, making it impossible to proceed further, the defendant distributed the product *pro rata*.

The evidence will show that early in the season, before they thought there would be a short pack, they distributed two small quantities, only twenty or forty cases, somewhere in excess of the percentage. We will show that the percentage or prorate, as we contend under the decisions a prorate means, would have amounted to nineteen and a fraction per cent to the various contract purchasers. And we will show that we did actually deliver to the plaintiff in this case, who held the largest order, some twenty-two and a fraction per cent of the entire contract.

We will show likewise that there was a shortage of crops and short pack, owing to the fact that before they could conclude the operations of the season a heavy frost came on and destroyed it. And we

will show that throughout the defendant endeavored in every way to comply with the contract and that the defendant did comply with the contract by giving not only what the plaintiff was entitled to in the way of his percentage, but more, because it could not be foreseen early in the season just exactly what prorate would be distributed.

Thereupon, after some discussion between counsel and the Court with respect to the law applicable to the case, defendant proceeded with his case as follows: [29—3]

Testimony of Victor V. Greco, for Defendant.

VICTOR V. GRECO, being duly called and sworn as a witness, testified as follows:

I am the president of the defendant Greco Canning Company. It operates its cannery and plant at San Jose, California, for fruits and vegetables. Prior to 1916 it had produced canned tomatoes. I am president and manager. They canned tomatoes as peeled tomatoes and sauce. I am the Greco whose name is signed to the contract sued on in this case. I personally met Mr. Pastene, manager of the Pastene Company. He visited my plant prior to signing the contract. We went through the plant together. At the time of signing the contract or prior to signing the contract he had gone entirely through my plant. Prior to 1916 I had not produced any such product known as Salsa De Pomodoro. Salsa De Pomodoro is a highly concentrated tomato. Prior to 1916 it had not been a domestic product in the United States of America, but had

(Testimony of Victor V. Greco.)

been imported from Italy. It is a substitute for tomatoes used principally by Italians in the making of sauces, gravies and soups. Prior to 1916 we had not produced such a product commercially, nor had it been produced commercially to my knowledge anywhere in the United States. The war was responsible for the commencement of the product in 1916 by the trade. There was an embargo placed on the exportation of that product by Italy, and therefore none came to America. This was the subject of discussion between Pastene and myself before the contract was signed. After signing the contract I took steps to fulfill it. I contracted for the necessary equipment and machinery, and apparatus for the manufacture of this product. During the year 1916 the peeled tomato and hot sauce departments of our canning plant were operated during the day time, while the Salsa De Pomodoro department was operated day and night. We would have made more profit [30—4] out of the Salsa De Pomodoro. It was to our interest to run the Salsa De Pomodoro plant at full capacity. We ran it to the fullest capacity that we possibly could. In other words, while running it, we had considerable interruptions, and, therefore, the capacity was reduced, owing to those interruptions.

We procured this machinery from the Oscar Krenz Manufacturing Company. I do not know of any other firm in America engaged in the manufacture of such machinery. The fact that we would require to install machinery for the purpose of manufactur-

(Testimony of Victor V. Greco.)

ing this product, this special product, was discussed between Mr. Pastene and myself. The capacity of the machinery was figured out during a season of about two months that we should have produced about 30,000 cases. 30,000 cases would have more than supplied the contracts we had signed. The total amount which we had contracted to deliver to our various customers was 18,930. These were future contracts; and the total capacity of the machinery which we had purchased for the purpose of delivering that was 30,000 cases for the season. We had a margin of something like 12,000 cases to go on.

The actual quantity produced by us by running night and day with our machinery was 3,445 cases. Prorating our deliveries, the percentage which we were bound to deliver to each one of those customers was 18.2 per cent. We actually delivered 665 cases to the plaintiff out of 3,445 cases produced by us for the year. The percentage of the pack that we actually delivered to the plaintiff was 22.2 per cent. Yesterday, as suggested by my counsel, I handed the attorney for the other side a list of the contracts and deliveries.

Thereupon the following proceedings took place:

“Mr. McNAB.—Q. I ask you whether you hold in your hand a [31—5] tabulation made from your books containing, first, the names of all the customers with whom you had made contracts; secondly, the quantity contracted for to each; third, the quantity actually delivered to each; fourth, the prorate or percentage of delivery to each, and, fifth,

(Testimony of Victor V. Greco.)

the price of each contract? Have you prepared such a statement? A. I have.

Q. Do you know it personally to be a correct statement? A. I do."

"Mr. McNAB.—Q. You say that you actually delivered to Pastene & Co. 22.2 per cent?

A. Yes.

Q. How did the other orders vary? What percentage did they run?

A. Uddo Bros. & Co., quantity contracted for, 5,000 cases, quantity delivered 950 cases, percentage of delivery, 19 per cent; price sold, \$6.75 per case."

Thereupon the document referred to by the witness was received in evidence and marked Defendant's Exhibit "A," and is as follows:

Defendant's Exhibit "A."

"LIST OF CONTRACTS AND DELIVERIES OF SALSA DE POMI-DORO ON 1916 PACK IN CASES.

Names.	Quantity Contracted.	Quantity Delivered.	Percentage of Delivery.	Price.
Uddo Bros. & Co.....	5000	950	19	6.75
J. W. McNience.....	3000	500	16.7	7.00
Ignatious Gross	2000	308	15.4	7.00
Schmidt & Ziegler.....	200	100	50	6.80
B. Karp	1000	154	15.4	7.50
Jos. Caruso	100	20	20	7.50
H. Ettinger	1000	154	15.4	7.50
J. A. Kirsch & Co.....	1000	154	15.4	7.50
M. Rosen	1000	154	15.4	7.50
S. Herekoritz	1000	154	15.4	7.50
Harry Hyman	20	10	50	7.50
C. Bellanca	500	100	20	7.50
A. B. Caberac	10	5	50	8.50
P. Pastine & Co.....	3000	665	22.2	7.50
John S. Sills Co.....	100	15	15	7.50
T. Sanfilippo	No contract	2		12.00
	18930	3445	18.2%	[32—6]

(Testimony of Victor V. Greco.)

“The COURT.—I want to know what the occasion was of this small production of this machinery that you say had a capacity of 30,000 cases. What were those interruptions?

Mr. McNAB.—Now state, first of all, the conditions with regard to the crop. Was there or was there not a sufficient quantity of tomatoes?

The COURT.—Why don't you let him state about these interruptions from this machinery? That is what I want. If it comes in logically I remember it a great deal better, and I like to remember the evidence.

Mr. McNAB.—Q. Mr. Greco, state fully to the Court just the exact facts with regard to this machinery, and what interruptions, if any, occurred thereto.

The COURT.—You said there were a great many interruptions.

A. Yes, the machinery for the manufacture of Salsa De Pomodoro consists, first, of certain machinery for the washing, crushing and pulping of these tomatoes.

The COURT.—This is understood as going in under your objection, Mr. Lannigan.

Mr. LANNIGAN.—Yes.

A. From there it went up to our factory room, where the concentration was to take place, and we had two vacuum plants with a capacity of 30,000 cases a season; the season consists of about ten weeks, that is, the tomato season. We found that in operating this apparatus, to get out the quality

(Testimony of Victor V. Greco.)

that we had intended to deliver, that is, a highly concentrated stuff, that the product would burn, would clog up the tubes of these pans; the pans were about from 700 to 750 gallons capacity each, and there were numerous tubes, several hundred tubes in each pan; the vacuum did not succeed in keeping the product in motion, this heavy concentrated [33—7] stuff, caused it to clog up in these tubes, and that it would burn and stick, and we had to get drills, electric drills, and drill it out, and in some cases it would take us a whole day to do it; at some times it was burned so hard, at one particular time it took us five days and five nights, changing shifts day and night, with the men working inside of these pans to clean out these tubes.

Q. Was that a defect in the machinery, or some defect in the nature of the stuff that was put through it?

A. I would say it was a defect in the machinery to this extent, your Honor, that we have overcome that of late years by having installed in this machinery, in this apparatus, larger tubes; to get additional steam surface, to get more tubes in the pan, to get additional steam surface, the manufacturer of this apparatus figured that a certain size tube was sufficient, but the fact was with the highly concentrated stuff the tube was too small, would not keep the stuff in circulation. We overcame this in following years, by enlarging the size of these tubes, by putting in larger tubes; we, however, de-

(Testimony of Victor V. Greco.)

creased the capacity of the machine, because we had less steam surface.”

These interruptions were very frequent. I do not recall that we were able to run one day without interruptions of that kind. The machinery was installed by the Oscar Krenz Manufacturing Company, the people with whom we contracted for the purchase of the machinery. The Krenz people had their own men down there operating the machinery for some time, to show our men or the man who was in charge, how to operate this machinery, it being something entirely new, and we had a man down there, I don't recall his name at the present time, but an engineer who was in charge. We also had a consulting engineer, Mr. Davis, who at that time was engineer for the San Jose Ice & Cold Storage Company, and following that season [34—8] I employed Mr. Davis, who is now superintendent of our plant. These people of whom I have been speaking are engineers by trade and training. There was no period of the day or night during the year 1916 during the packing season, that we were not continuously operating the Sala De Pomodoro machinery.

Q. Now, was the fact that there was no machinery in the United States or machinery other than that purchased from the Krenz Company—was that discussed between you and Mr. Pastene, prior to entering into this contract?

Mr. LANNIGAN.—That is objected to as imma-

(Testimony of Victor V. Greco.)

terial, irrelevant and incompetent, and not addressed to any issue in this case.

The COURT.—I will let it go in, subject to the objection.

A. It was discussed with Mr. Pastene, that this kind of machinery, the vacuum machinery, was the kind of machinery produced the best quality or grade.

Thereupon the following took place:

Q. Was the fact that Salsa De Pomodoro had never been produced in the United States, and that it was in its experimental stage in any way discussed between you and Mr. Pastene?

Mr. LANNIGAN.—The same objection.

A. Yes, it was.

The COURT.—I do not think that is within the defense of incapacity of the machinery, and it certainly is not within either of the other defenses set up, that is, matters over which one has no control. Of course, the latter would be on the assumption that one entering into a contract was capable of fulfilling it under any ordinary conditions. I will sustain the objection to that.

Mr. McNAB.—We will take an exception.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 1. [35—9]

The witness proceeding:

The engineers, the people who furnished the machinery, stated that they had figured out that these two apparatuses would produce, during the season

(Testimony of Victor V. Greco.)

of about ten weeks not less than 30,000 cases of the product. There was absolutely nothing within my knowledge that was left undone in order to make this product successful. Coming down to the crop in question: We did not produce a full pack in 1916. During the operating season of 1916 the tomatoes were affected by the water. There were insufficient tomatoes for me to procure a full pack. The reasons were climatic, normal, early rains and early frosts. With relation to the end of the packing season those rains and frosts occurred much earlier than normal. My recollection is that almost two weeks earlier than normal.

Thereupon the following took place:

“Q. What was the effect of these early rains and frosts on the Santa Clara Valley tomato crop?”

Mr. LANNIGAN.—I object to that on the ground it is incompetent and irrelevant in this, that we are not to be confined to the Santa Clara Valley tomato crop. The Court can take judicial knowledge of the fact that tomatoes are produced in various other places in California.

The COURT.—Yes, it would not necessarily be confined to the State, because there is no limitation in this contract that they would be manufactured from the product grown in this State or grown in any particular community.”

The witness proceeding:

Prior to commencing our operations in 1916, we had taken steps to procure a sufficient tonnage of tomatoes for our product—a sufficient amount to

(Testimony of Victor V. Greco.)

produce the entire quantity which [36—10] we had contracted for. We actually made contracts for a tomato acreage sufficient to enable our plant to run and supply our entire contracts. It was our custom to buy in the immediate vicinity, so as to get best results, get better quality of raw material, and get it to our canning plant fresh, so our contracts were mostly entered into in the Santa Clara Valley. We never aimed to buy outside at any great distance. In doing that we were following the usual custom of our plant. I positively know of my own knowledge that our contracts were over a sufficient acreage necessary to supply our entire contracts. Had the weather conditions not interfered at the time to which I have just testified, we would have been able normally to proceed and purchase a very much larger quantity.

Mr. McNAB.—Q. Go right ahead and state fairly and frankly to the Court just what you would have been able to do had the weather conditions not interfered?

The COURT.—What I wanted to know is what these conditions were, how they affected that particular season. What were the climatic conditions, and how did they affect the tomato crop?

A. A rain during the peak of the season has the effect of stopping maturing of tomatoes and rotting those on the vines already matured.

WITNESS.—(Continuing.) I was going to proceed, a rain is usually followed, then, by a heavy frost, and an early frost stops any further develop-

(Testimony of Victor V. Greco.)

ment or ripening of those tomatoes, so the quantity of tomatoes is considerably reduced by a rain and frost.

Mr. McNAB.—What the Court wants to know is, did such a rain and frost occur, and if it did, when?

A. I don't recall exactly the date.

The COURT.—A hydrographic report would show very clearly [37—11] when anything of that kind occurred.

WITNESS.—(Continuing.) Such a rain and frost did occur during the canning season, during the tomato season. That was in 1916. I think in 1916 we had rain during the latter part of October; usually our canning season does not end until the end of November. We have worked as late as December 10th canning tomatoes. The usual tomato season, when they first ripen, is from about the 20th of August to the end of November, the 30th of November.

The COURT.—I thought you said the capacity of this machine, during a period of about ten weeks, the usual tomato season, was 30,000 cases?

A. Yes, your Honor. The idea is this—

Q. You are specifying a month longer season.

A. But you see at the beginning of the season your quantity of raw material that comes in is very limited, because you are only picking a few, and at the latter end of the season you are very limited, because you are only picking a few; but you have the bulk of this material within those ten weeks. That is what is called the peak of the season.

(Testimony of Victor V. Greco.)

WITNESS.—(Continuing.) I think these rains extended beyond the Santa Clara Valley, all over the state. The effect of these early rains upon the tomato crop decreases the tonnage. The effect upon the tomato crop in the Santa Clara Valley decreased my tonnage.

Mr. McNAB.—Q. To what extent, what was the effect on the crop that was out in the field? Describe it to the Court.

A. You would not get two fields that were alike, Mr. McNab, because one field, if properly taken care of, regardless of rain and weather conditions, will produce maybe 25 tons of tomatoes to an acre. Another field in the same valley and handled by some other man, not properly cultivated, will produce, maybe, only three tons [38—12] to the acre.

WITNESS.—(Continuing.) After this rain occurred it was followed by a heavy frost. As a result of that rain and frost we could not secure tomatoes to continue the running of our plant, and it could never be done, because we cannot buy tomatoes in the open market; there are none to be had. The tomatoes are usually contracted for by all the canneries. We figure out our tonnage of requirements, and we base our acreage on the yield per ton and contract accordingly. When we buy tomatoes, we do not buy by tons, but we contract for acreage of different patches, maybe ten, twenty or thirty patches; one patch will have five acres, another 20 or 30 or 40. We contract to take all their

(Testimony of Victor V. Greco.)

tomatoes, provided they are ripe and in good condition. After this rain and frost occurred, it would absolutely not have been possible within my knowledge, to have secured tomatoes in any other locality, either in California or elsewhere.

The COURT.—He has not yet stated when this rain occurred. He said he thought a frost occurred. When did these occur?

A. Your Honor, I said that the rains, my recollection was, were about the latter part of October, during the peak of the season; we had our first rains then, and then these rains were repeated, and then we had an early frost, which I do not recall the date of any more, but there were early frosts caused by the early rains.

Mr. McNAB.—After these rains and frosts occurred, did you notify the plaintiff in this case?

A. Yes.

WITNESS.—(Continuing.) I do not remember when I notified them. I would have to refer to my memorandum.

Mr. McNAB.—With regard to conditions throughout the Santa Clara Valley, what was the effect on the entire tomato crop with regard to all canneries there under operation? [39—13]

A. They all more or less suffered.

Q. With regard to whether or not there was short pack in all canneries, what was the fact as to that?

A. There was a prorate delivery on canned tomatoes that year by many other canneries, I think.

Thereupon the defendant introduced in evidence and there was read into the record the following letter addressed by the defendant to the plaintiff:

Defendant's Exhibit "B."

"San Jose, California, October Twelfth, 1916.

"P. Pastene & Co.,

"Boston, Mass.

"Gentlemen:

"Your communications of recent dates were received. We have failed answering you sooner for several reasons. The writer has been very busy with factory operations, particularly with the new line for the salsini, which has proven a failure as to getting out the quantity that we expected, due to the fact that the tube system in our vacuum pans is wrong. We can only operate this for a short period and it takes from five to six times the time for cleaning out.

"The tomato pulp contains quite a percentage of albumen and this causes the material in the tube to burn. We are now operating on about a 25% efficiency and been compelled to reduce the concentration somewhat so as to enable us to get some out.

"We are now pretty late in the season and from all indications it appears that not over a 25% delivery can be made of which we are extremely sorry as we intended to make full delivery, notwithstanding that our contract provides for prorated delivery.

"We are sending you sample by parcel post and

(Testimony of Victor V. Greco.)

trust to hear from you by return mail. You may also inform us that if in the [40—14] event the embargo on the Sunset Gulf shipments is still on whether or not we could ship over rail. For your information we may also add that the crop this year is very short as we have had considerable rains which has caused much damage.

“With kindest regards to your Mr. Chas. Pastene, we wish to remain,

“Yours truly,

“GRECO CANNING CO.,

“By V. V. GRECO.”

Said letter was received in evidence and marked Defendant's Exhibit “B.”

WITNESS.—(Continuing.) That letter dated October 12, 1916, refreshes my recollection with regard to the time of the rains. We must have had rain at that time, or I would not have written that letter. My recollection at this time, when I was testifying was about the latter part of October. Now this refreshes my memory that the rains were earlier, that is, they were in the early part of October. With respect to October 12th—the very peak of the season is between the 1st and 15th of October—the very peak of the season. If a rain occurred prior to October 12th, it would occur during the peak of the season. From the time that these rains occurred, we were not able to secure tomatoes fit for canning anywhere.

The defendant here offered, and there was received in evidence and marked Defendant's Exhibit

“C,” the answer of the plaintiff to said letter. Said letter is as follows:

Defendant's Exhibit “C.”

(Letterhead of P. Pastene & Co., Inc., Boston.)

“Oct. 25th, 1916.

“The Greco Canning Co.,

“San Jose, California.

“Gentlemen: [41—15]

“We duly received your favor of the 12th to which we have not sooner replied as we have been waiting the receipt of the samples of salsa which you stated in said letter you were forwarding by parcels post. Appreciating that frequently, considerable delay occurs in the delivery of these packages, we have felt, until today, that the failure to receive these samples was simply the result of such a delay and that they ultimately would be delivered but when today after a lapse of thirteen days from the writing of your letter, they have not as yet come to hand, we have decided to wire you as follows:

“‘Salsa samples not received duplicate immediately registered special delivery telegraph.’

“This telegram we believe clear and we now look forward to your wire advising that the duplicate samples which we have requested have been forwarded. Meanwhile, should the first lot come to hand, we will immediately examine them advising you of our decision in the matter.

“We regret exceedingly to learn the serious difficulty you are experiencing with machinery, owing to the fact that the tube system in your vacuum pans is wrong. Certainly your advice that you cannot now estimate on making more than a 25% delivery is a severe disappointment. We certainly trust that you will find that you have been over-conservative in making this estimate and that it will be possible for you to make considerably larger delivery than this statement would now indicate.

“At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any [42—16] case we shall expect a full *pro rata* delivery of all such goods as you are successful in producing.

“Shipment: We are informed that the embargo on water shipments is to be lifted tomorrow so that we trust that you will find no difficulty in making shipment via. this route. Should conditions however make it necessary that we furnish you with corrected shipping instructions, when the goods are ready for delivery communicate with us by wire if necessary and we will immediately furnish you with these necessary instructions.

“Trust that your later news may advise a material improvement in the unfortunate conditions confronting you, and reciprocating in behalf of our Mr.

(Testimony of Victor V. Greco.)

Charles A. Pastene who is at present out of town, the kind regards extended, we beg to remain,

“Yours respectfully,

“P. PASTENE & CO., INC.

“P. R. PASTENE.”

Q. Now, in response to this statement contained in this letter which I have just read, “We certainly trust that you will find that you have been over-conservative in making this estimate, and that it will be possible for you to make considerably larger delivery than this statement would now indicate,” you testify that you were only able to produce 19.2 per cent? A. 18.2 per cent.

Q. And actually delivered to Pastene?

A. 22.2 per cent.

WITNESS.—(Continuing.) In response to the portion of the letter which reads: “At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in a reasonable fashion in considering the unfortunate condition [43—17] which has confronted you,” I left absolutely nothing in my power undone to comply with my contract in every respect. I was personally, myself, at the plant, in the vacuum till one and two o’clock in the morning to see that the work was pushed ahead.

Thereupon the defendant offered and there was received in evidence and marked Defendant’s Exhibit “D,” the following letter:

Defendant's Exhibit "D."

(Letterhead Greco Canning Company.)

"San Jose, California, November 2d, 1916.

"P. Pastene & Co.,

"Boston, Mass.

"Gentlemen:

"Your kind favor of the 25th to hand and contents noted. We are extremely sorry of having had to prorate deliveries for reasons set forth in our previous letter. Twenty per cent is about the very best that we are going to be able to fill. Regardless of this, so as to make up a minimum car we have shipped you 665 cases for which inclosed find copy of invoice, and draft will reach you through one of the banks in New York, which was forwarded through the Bank of Italy, of this city.

"We are now planning for a new arrangement for next season and will install a different system of vacuum pans, and hope to be more fortunate in our pack.

"Yours very truly,

"GRECO CANNING CO.,

"By V. V. G.

"P. S.—Invoice mailed under separate cover."

There was thereupon introduced in evidence by the defendant and marked Exhibit "E" the following letter:

Defendant's Exhibit "E."

"Boston, November 7th, 1916.

"The Greco Canning Co., [44—18]

"San Jose, California.

"Gentlemen:

"Confirming ours of the 30th ultimo.

"SAMPLES: The duplicates which you have sent to us by express came to hand a day or two ago and upon examination, we find that in fact, as you previously advised, the concentration is not all that it should be. However, considering the unfortunate circumstances which you have encountered, as explained to us in your recent favors, we have no complaint to offer and providing the delivery you make to us is equal to the sample received, we shall consider the delivery a good one.

"SHIPMENT: We had rather hoped to have received definite advice that shipment which your telegram of October 26th advised would probably go forward in a day or two, was now actually on the way. We certainly trust there will be no particular delay in the forwarding of this lot and that we may hear from you now any day that the goods are in transit.

"PRO RATA: We understand that weather conditions have greatly improved during the last ten days in your country and that a long packing season is anticipated. We surely trust that these predictions may not miscarry as in that case we are confident that you will find it possible to considerably increase the production which you previously

(Testimony of Victor V. Greco.)

estimated as possible. As previously written you, we certainly have no intention of being unreasonable or expecting from you that which it is physically impossible for you to accomplish, but we do expect, of course, that you will spare no efforts to, as nearly as possible, fill your contracts, and it is for this reason that knowing that conditions have materially improved since you previously wrote us on this subject, we look forward to a better delivery than previously predicted. Knowing that [45—19] you will not spare any reasonable efforts to attain the desired result, we look forward in anticipation to your more favorable news as mentioned.

“Yours Respectfully,

“P. PASTENE & CO., INC.

“P. R. PASTENE.”

WITNESS.—(Continuing.) With reference to the date of this letter, November 7th—on November 7th there would not be any tomatoes left on the vines. There was absolutely nothing that we could have done after November 7th in any way to have increased the pack. Mr. Pastene was just imagining that conditions had improved here.

Thereupon defendant introduced in evidence and there was marked as Defendant's Exhibit “F” the following letter:

Defendant's Exhibit "F."

"San Jose, California, November 13th, 1916.

"P. Pastene & Co.,

"Boston, Mass.

"Gentlemen:

"Your esteemed favor of the 7th to hand. By this time, undoubtedly, you are in receipt of advises of shipment of car via Sunset Gulf of tomato paste. The conditions have not improved as expected. As a matter of fact, we have had a very early frost which has put a stop to the canning. We are obliged to discontinue canning tomatoes, and are now running our line on the Salsa, expecting to finish the season on this so as to enable us to make good our 20% delivery to our other firms who have not had 20%, and some none at all. We are doing this at a great loss to us, as you know the tomato market on 2½ cans has advanced about \$1.00 per case.

"We assure you we are extremely sorry that we are not able to do any better than we did, and we hope next season to be [46—20] more successful. We are anticipating re-arranging this line and installing a different apparatus.

"Yours very truly,

"GRECO CANNING CO.,

"By V. V. GRECO."

Thereupon there was received in evidence and marked Defendant's Exhibit "G," the following telegram:

(Testimony of Victor V. Greco.)

Defendant's Exhibit "G."

"New York, Dec. 19, '16.

"Greco Canning Co.,

"San Jose.

"Sales just arrived billed as tomato sauce instead of canned vegetables Southern Pacific demanding ninety cent rate. Kindly arrange agents there correct rate to forty. Further sauce very liquid not similar quality shipments made others sauce which considerably more concentrated we protest the quality and protect per cent delivery as against fifty sixty per cent made to others our contract one of the first made. Await your remarks.

"P. PASTENE CO., INC."

Mr. McNAB.—Q. Did you deliver 50 or 60 per cent prorate delivery to anybody?

A. Not 50. I did deliver in two small cases, no, three, 50 per cent.

Q. Those were as to the size of the shipment what?

A. The contract with Schmidt & Ziegler for 200 cases, we delivered 100. That made a 50 per cent delivery, and this shipment was made early in the season, when we expected we were going to pack more than we actually packed.

Q. There were only 200 cases?

A. Yes. There is another item where we had sold 20 cases and delivered 10, and another item where we sold 10 and delivered 5. There are only three cases where there was a 50 per cent delivery.

Q. They are the only deliveries of a greater per

(Testimony of Victor V. Greco.)

cent than the [47—21] ones that were actually delivered to the plaintiff? A. Absolutely.

Q. All the others that you delivered to your customers were down to between 15 and 20 per cent?

A. Yes.

There was thereupon received in evidence and marked as Defendant's Exhibit "H," the following letter:

Defendant's Exhibit "H."

(Letterhead P. Pastene & Co., Inc., New York.)

"Dec. 19/16.

"Greco Canning Co.,

"San Jose, Calif.

"Gentlemen:

"We confirm our wire of this date which we consider clear; we will take up the points, however, in the order named.

"FREIGHT RATES: Owing to the fact that you shipped these goods as tomato sauce, we were surprised to find that the Southern Pacific charged us a 90-cent rate as against the 40-cent rate from terminal or 45-cent rate from San Jose, under which rate we have received various other shipments of tomato products, such as, for example, Del Monte sauce. The rate clerks here refused to correct the rate, stating that tomato sauce pays a 90-cent rate as by them billed, or double the regular tomato pulp, ketchup or canned tomato products rate, and therefore we have requested that they wire back to the coast for instructions to correct and we advised you also along the same lines.

Prompt attention to the matter will help considerable.

“QUALITY OF SAUCE: While the samples which you sent us some time ago were very liquid, owing to the statement which you made in your explanation of the trouble with your coils, etc., we—with the idea of being fair to you, and not asking the impossible—stated nothing or made no serious complaints. Meanwhile, however, while goods were in transit we have seen samples of your [48—22] sauce which other concerns have received, and were surprised to see that the quality was much more concentrated. However, we made no comments or did not write you then, believing that when the actual shipment was made, quality of the concentration of the goods which you had shipped us would unquestionably be up to the standard shipped to others previous to our shipment, inasmuch as you know you delayed considerably in forwarding our goods, whereas you made shipments to our competitors much earlier.

“Now, imagine our surprise upon getting a can as a sample, to find that it is even more liquid than the samples which you sent us; in other words, it is not a tomato sauce at all, but simply a tomato ketchup, or a consistency not much greater than water. This is not a fair deal and one unworthy of yourselves and unjust to us who trusted you, and were one of the first to sign your order. In fact, the writer was one of the first to see you on this article at all. We repeat what we stated in

(Testimony of Victor V. Greco.)

our telegram, we protest this sort of article and demand an explanation before going further in the matter.

“PRO RATA DELIVERY: You gave us a 23% delivery on our contract and we have since learned that other concerns have received considerably more. Two concerns who we know of in the South advised that they have received 50% delivery from you. Right is right and we demand a fair, honorable deal, and we now ask you to please be good enough to tell us what you intend to do in the matter.

“Awaiting a prompt reply to our communication as we dislike having any friction, we beg to remain,

“Yours respectfully,

“P. PASTENE & CO., INC.

“C. A. P. Per U.” [49—23]

WITNESS.—(Continuing.) Beyond these three small shipments I have testified to, there were absolutely no others who ever received a larger prorate delivery than the two, and the one that he refers to in the South is the Schmidt & Ziegler case, where they bought 200 cases and we shipped only 100 early in the season, and we had to complete the car because it was a mixed car; in that car were included other products.

There was thereupon received in evidence and marked as Defendant's Exhibit “I” the following letter:

Defendant's Exhibit "I."

"San Jose, California, Dec. 26, 1916.

"P. Pastene & Co.,

"New York City, N. Y.

"Gentlemen:

"We are in receipt of your favor of the 19th. On receipt of your wire several days ago, we immediately got busy at this end with the Southern Pacific Co., and succeeded in obtaining the 45¢ rate for you. It was no mistake of ours in billing it as Tomato Sauce, as this is actually what it is, but we had, prior to going ahead with the pack of this article, taken this matter up with the Transportation Co., and had succeeded in getting the 45¢ rate, which applies to canned goods of this commodity. We had this letter to show and this enabled us without any difficulty in settling the matter.

"You complain about having received your sauce too late. This was no fault of ours as this was among the early shipments, but as same went Sunset Gulf, it took almost two months to get to destination, while the other goods shipped all rail to New York got there, and while shipped later than this, got to destination in much shorter time.

"As to the quality, we believe that you will find it equal to others on opening up cans from other cases. Our pack [50—24] was not uniform on account of reasons explained in our previous letters. We had to make the best of the situation and get out as large a quantity as we possibly could.

“In regards to your complaint as to short delivery, we assure you that you got a larger delivery than many others, some did not succeed in getting but 151½%. In the beginning of the season we thought that we would succeed in packing about a 50% delivery, but we regret to advise that we did not succeed in doing so. Your shipment being earlier than some of the others, constituted a larger delivery, while the very last that we shipped out, all that we could deliver was a 151½% as mentioned above.

“Owing to advance on all supplies and raw material the cost of this product next season is going to be considerable higher and if you are satisfied with the goods, we are inclined to protect you on a limited amount—say about the quantity that we fell short, at \$10.00 per case.

“Knowing of the faults with the machinery we feel that during next season’s pack, we can remedy this and succeed in packing the article that we have in mind, of a good consistency. If this appeals to you, we will issue new contracts for next year’s pack. It is our desire to first protect our customers before offering any of next year’s goods for sale to new buyers.

“Awaiting to hear from you, we remain,

“Yours very truly,

“GRECO CANNING CO.,

“By. V. V. G.”

There was thereupon received in evidence and marked as Defendant’s Exhibit “J” the answer thereto, which is as follows: [51—25]

Defendant's Exhibit "J."

(Letterhead P. Pastene & Co., Inc., Boston.)

"January 10th, 1917.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"We acknowledge receipt of your letter of the 26th, which for some unaccountable reason delayed in arriving.

"We have noted the contents of your communication and will take the items therein referred to under separate heading.

"FREIGHT RATE SOUTHERN PACIFIC: Matter was adjusted on the 45¢ rate and note how it was possible to do so. However, if you had billed as 'canned vegetables' you would have saved us a week's time at least in obtaining the goods.

"QUALITY: We can only repeat that which we have previously stated,—of the various samples which we have opened from various cases taken at random, we have never found anything but a very liquid sauce, whereas we have seen samples taken at random from cases others had received in New York under your same brand in which the sauce was of a very much greater consistency. From the reading of your remarks, it would seem as if the consistency ran uneven throughout the entire pack, whereas we presume you really mean that sometimes the out-turn was better than at other times, and assuming that is the case, we certainly received,—we should take it from the looks of the

goods—one of the very worst lots. We of course realize that you had trouble with your machinery and are trying to make allowances. None the less, we cannot feel entirely satisfied with the treatments received on this item and it would be useless for us to attempt to tell you anything different.

“PERCENTAGE OF DELIVERY: We have no doubt that your statements are true in so far as they go. You tell of having delivered [52—26] as low as 15½% but you do not state the highest per cent against delivery. We can only repeat that which we have already advised you—of information received from other sources of as high as 60% delivery and we certainly do not see why we should be elated at having received about 20% as against 15½ of some others.

“Lastly we note what you state about perfecting the machinery and your belief that during next season you can pack an article of a good consistency—whatever that may mean—and that you desire to make up the deficiency or short delivery of this year by offering to protect the quantity you fell short on a basis of \$10.00 per case. Inasmuch as you are offering thru your New York brokers, Messrs. Seggerman Bros. & McNeiff—so we understand, for kindly note we do not make this as a positive assertion—on a basis of \$11.00 per case f. o. b. terminal California with a 40¢ allowance for freight, we do not see where you are making us such a ‘great’ proposition.

“Honestly we are thoroughly disappointed! We cannot feel that you have treated us justly in this

(Testimony of Victor V. Greco.)

present season. Our information was that you should have been able to deliver our 60%. We have further information that you have sold pulp to various concerns. We appreciate that possibly that was due to machinery trouble.

“In conclusion, we can but state that we feel we are entitled to a further delivery on the 1916 pack and expect you will do so, and shipping a better quality than the one shipment made.

“As to the new pack, we are willing to close with you for 3000 cases of the new pack, subject to goods being of such quality as you are well aware they should be, and satisfactory to us, at the price you name of \$10.00 per case less allowance of freight on a basis of 40¢ per hundred. We await to hear from you on our coments.

“TOMATOES, EXTRA’S AND STANDARD’S: We would like to treat with you for a purchase of next season’s pack. What can you offer?

“Yours respectfully,

“P. PASTENE & CO., INC.

“C. A. P.” [53—27]

WITNESS.—(Continuing). I did not enter into a contract for the delivery of Salsa De Pomodoro for the following year with him. We could not come to a satisfactory arrangement as to price.

Thereupon there was received in evidence and marked Defendant’s Exhibit “K” the following telegram:

Defendant's Exhibit "K."

(Western Union Night Letter.)

"San Jose, Calif. Jan. 16, 1917.

"Pastene & Co.,

"69-75 Fulton St.,

"Boston, Mass.

"Replying to your letter of tenth instant impossible to accept conditions named therein. Consequently our offer to supply three thousand cases Salsa di Pomodoro at ten dollars per case is hereby withdrawn. Confirmation of this telegram being sent you by registered mail.

"GRECO CANNING CO."

There was thereupon received in evidence and marked as Defendant's Exhibit "L" the following letter:

Defendant's Exhibit "L."

(Letterhead of P. Pastene & Co., Inc., New York.)

"Jan. 18/17.

"Greco Canning Co., San Jose, Calif.

"Gentlemen:

"Our Boston house forwards the writer your wire of the 16th, reading:

"Replying to your letter of tenth inst. impossible to accept conditions named therein, consequently our offer to supply three thousand cases salsa di Pomodoro at ten dollars per case is hereby withdrawn confirmation of this telegram being sent you by registered mail.

“In reply to the above wire, we have nothing to state at the moment, preferring to await your letter of explanation, [54—28] which we presume accompanies copy of this wire which you state you are forwarding by registered mail; upon receipt we shall then state whatever will be necessary and in order.

“Meanwhile we beg to add that we protest against this action as unwarranted and unjust.

“Yours respectfully,

“P. PASTENE CO., INC.”

There was then received in evidence and marked Defendant's Exhibit “M,” the following letter:

Defendant's Exhibit “M.”

“San Jose, California, January Fifth, 1916.

“P. Pastene & Co.,

“152 Franklin St.,

“New York, N. Y.

“Gentlemen:

“Knowing your house to be large Importers of Naples Canned Tomatoes, we have some 8000 cases of Solid Pack peeled Tomatoes, quality of which if any different will be superior to that packed in Naples, Italy. If you are interested we will quote you a very attractive price.

“Regarding Naples Tomatoe Sauce packed in small 6 oz. tins, in view of the present conditions in Europe which makes it almost impossible to receive any of this commodity from said country, we are contemplating to pack about 60,000 cases of the

article above mentioned which will be sold as a substitute of the Imported.

“As we are Italian and know what the Italian people must have and being very familiar with the method of manufacturing this article, you can rest assured that it will be the equal of that imported from Italy.

“We will greatly appreciate a line from you in regards to the above and thanking you in advance for same, we are,

“Respectfully yours,

“GRECO CANNING CO.,

“By A. G.” [55—29]

“P. S.—We are located in the heart of the Santa Clara Valley where some of the finest tomatoes in the world are grown.

“Inform us of all the articles you are interested in, perhaps we are in a position to furnish same.”

There was thereupon received in evidence and marked Defendant’s Exhibit “N,” the following letter:

Defendant’s Exhibit “N.”

(Letterhead of P. Pastene & Co., Inc., Boston.)

“January 15th, 1916.

“The Greco Canning Co.,

“San Jose, California.

“Gentlemen:

“We have to acknowledge receipt of yours of the 5th in reference to Naples style Peeled Tomatoes.

“We beg to advise that we are large users of the Italian Tomato and should be pleased to hear from

you with prices on the goods you have to offer. We should also, of course, expect to be furnished with sample.

“TOMATO SAUCE: We are also large handlers of this article. When you are in a position to quote prices and submit samples on the goods of this class which you expect in the near future to have ready to put before your trade, we should certainly appreciate hearing from you.

“Awaiting your further news, we remain,

“Yours respectfully,

“P. PASTENE & CO., INC.,

“P. R. P.”

There was thereupon received in evidence and marked Defendant’s Exhibit “O,” the following letter:

Defendant’s Exhibit “O.”

“January Twenty-second, 1916.

“P. Pastene & Co.,

“Boston, Mass.

“Gentlemen:

“Your esteemed favor of the 15th inst., to hand and contents [56—30] noted. We wish to thank you for your prompt reply to our previous letter and for the interest shown in our products.

“In accordance to your wishes we are today forwarding to you by Wells, Fargo Express, charges prepaid sample of 6 tins of our Solid Pack Tomatoes as this is the only article that we have presently to offer for spot shipment. We offer these for prompt acceptance and shipment and subject to

prior sale at 95¢ per dozen less 11½% cash ½ of 1% swell allowance F. O. B. San Francisco, enabling you to enjoy the 40¢ rate via Sunset Gulf.

“These goods are packed 2 dozen to the case weighing 60 pounds. To enjoy the 40¢ rate minimum capacity is 80,000 pounds. This same rate applies to New York and Philadelphia.

“You will notice on receipt of these samples the excellent quality of this pack and trust that you will see fit in placing your order with us.

“‘Salsina.’ The information furnished us on this article was very interesting. We will endeavor too in the near future to forward you samples of this article that we propose to pack.

“We have an idea to improve upon the package and we wish to mention it and will be very much pleased to have your views, that is instead of packing 200 cans to the case as the imported, to pack this in fiber cases containing 100 cans each. This article is sold at so much per 100 and therefore the size of the container will have no bearing on the selling price. The advantage of this style of container will be the saving in freight rate which in our estimation will amount to about 20% which in itself is quite a large item or about \$64.00 per car.

“What we propose to pack is a very high class article and if possible to improve upon the quality of the Italian we will endeavor to do so. We also wish to know if you favor the Basilica [57—31] flavor?

(Testimony of Victor V. Greco.)

“Trusting to hear from you again soon, we wish to remain,

“Yours very truly,
“GRECO CANNING CO.
“By _____.”

The COURT.—What is Salsina?

A. It is a little leaf; it is an herb.

There was thereupon received in evidence and marked Defendant's Exhibit “P,” the following letter:

Defendant's Exhibit “P.”

“February 21st, 1916.

“The Greco Canning Co.,

“San Jose, California.

“Gentlemen:

“We duly received your favor of January 22nd, to which we have not sooner replied as we have been giving your remarks our consideration and attention. We also have examined the sample Tomatoes which you have forwarded and which you have offered us in your above mentioned letter.

“We will not attempt to reply to your letter in detail at this time in view of the fact that our President, Mr. C. A. Pastene, finding it necessary to be in San Francisco some time within the next ten days, he will at that time arrange to communicate with you when the matter of possible arrangements for handling your products in the future can more advantageously be taken up than is possible by mail.

“In the meantime, we beg to remain,

“Yours respectfully,

“P. PASTENE & CO., INC.,

“Per P. R. P.” [58—32]

There was thereupon received in evidence and marked Defendant's Exhibit “Q,” the following letter:

Defendant's Exhibit “Q.”

“March Sixth, 1916.

“Mr. Chas. A. Pastene,

“c/o Mr. R. S. Edwards,

“Berkeley, Calif.

“Copy: P. Pastene & Co., Inc., Boston, Mass.

“Dear Sir:

“Referring to yesterday's conversation concerning the lot of De Luxe Sauce that we offered you at 85¢ F. O. B. Boston, please be advised that in making you these prices, we failed to call your attention to the trade discount of 10% as the 85¢ price given you was intended for the retailer, so as you will see our price to you will be 85¢ less 10% trade and 1½% per cent cash F. O. B. Boston.”

“We also wish to mention as a reminder the lot of No. 2-½ Solid Pack that we still have to offer on which we quote you a price of 90¢ F. O. B. San Francisco less discount as per our previous correspondence.

“REF. SALSINA. We are very much enthused of the outcome of your visit here yesterday to our plant as several points of very much interest to us was brought out concerning this article and on

(Testimony of Victor V. Greco.)

arrival of samples that you have volunteered to have your house send us, we will immediately on receipt of these samples address you again.

“You will agree with us that it is going to be somewhat impossible for us to state whether we can duplicate these goods but the writer made clear to you as to what we intended to do for the packing of a high class article. It is very interesting to note the quantity that you people handle to the extent that we [59—33] now feel that our contemplated equipment should be enlarged and go at it on a much larger scale than we had planned.

“Thanking you for your visit yesterday and trusting that you have arrived at your destination safely and with best regards to Mr. Edwards and yourself, I wish to remain,

“Yours very truly,

“GRECO CANNING CO.

“By _____.”

Mr. McNAB.—Q. This letter was written the day following a conversation with Mr. Pastene. That conversation occurred where?

A. At my office in San Jose.

Q. Did you have more than one interview with him?

A. I am not quite sure but what he called twice.

Thereupon there was received in evidence and marked as Defendant's Exhibit “R,” the following letter:

(Testimony of Victor V. Greco.)

Defendant's Exhibit "R."

(Letterhead P. Pastene & Co., Inc., Boston.)

"March 10th, 1916.

"Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"At the instructions of Mr. C. A. Pastene, we have sent you a parcel containing sample cans of Cirio and Piedigrotta brands of Naples Salsa or Tomato Sauce.

"We trust this package will reach you promptly.

"Yours respectfully,

"P. PASTENE & CO., INC.,

"Per P. R. P."

Mr. McNAB.—Q. What is Cirio?

A. That is the imported article. There were two sample cans they sent us of the imported, to give us an idea of what the requirements would be, so that we could duplicate them, if possible. [60—34]

Q. Prior to this time, had you ever produced any Salsa De Pomodoro?

A. Not for commercial purposes, except making some experiments.

There was then received in evidence and marked as Defendant's Exhibit "S," the following letter:

(Testimony of Victor V. Greco.)

Defendant's Exhibit "S."

"March Twenty-ninth, 1916.

"P. Pastene & Co.,
"69 Fulton St.,
"Boston, Mass.

"Gentlemen:—

"The samples of Cirio and Piedigrotta brands of Naples Sauce have been received for which accept our thanks. We have examined this article and cannot see any reason why we cannot duplicate it.

"We have everything in such a shape to enable us to go ahead with the pack of this article of which we now mention a price of \$3.50 per hundred F. O. B. San Jose, regardless of the fact that we know that the Imported is now selling at \$15.00 a case, which price in our estimation is prohibited as we cannot see how the consumer can afford to pay 10¢ for a can, as this price would have to be *ask* by the trade, when they can buy tomatoes at a cheaper price.

We are confident that if we once get in with our article that it will stick and we are now working on these lines. This accounts for our low prices that we have named, however, we will only book a limited amount of business on these basis as we much prefer a wide distribution.

"As promised your Mr. Pastene, we are now offering you this article at the price mentioned above, and if you are interested, we would be glad to hear

from you soon. Our offer is for prompt acceptance and subject to our confirmation.

“We wish to impress upon you the fact that the quality [61—35] will be A-1 and we will guarantee it such.

“If you are still in the market and have not made other arrangements, we would be pleased to hear from you by return mail.

“With best regards to your Mr. Chas. Pastene whom the writer has had the pleasure of meeting, we remain,

“Yours very truly,
“GRECO CANNING CO.

“By _____.”

There was then received in evidence and marked as Defendant’s Exhibit “T,” the following letter:

Defendant’s Exhibit “T.”

“April 4th, 1916.

“The Greco Canning Co.,

“San Jose, California.

“Gentlemen:

“We have to acknowledge receipt of your favor of the 29th which we have noted with considerable interest.

“At this time, however, we beg to state that our Mr. C. A. Pastene, who you will remember took this matter up with you personally, has not as yet returned from the west and as the matter is one which he had personally been investigating and handling, we prefer to wait his return before replying to your letter in a definite manner. We expect

that Mr. Pastene will be back in Boston in a week to ten days and immediately that he is here we will place your letter before him for his attention.

“Meanwhile, thanking you for your prompt attention to this matter and assuring you that you will hear from us again in the very near future, we beg to remain,

“Yours respectfully,
“P. PASTENE & CO., INC.,
“Per P. R. P.”

There was then received in evidence and marked Defendant’s Exhibit “U,” the following letter:
[62—36]

Defendant’s Exhibit “U.”

“April Tenth, 1916.

“A. Pastene & Co., Inc.,

“Boston, Mass.

“Gentlemen:

“We have your favor of the 4th inst. to hand and learn that your Mr. C. Pastene has not yet returned, but trust that upon his return that we may hear from him promptly as you suggest.

“From the way we are booking orders on this product, it appears to us that prompt action must be taken by you as we wish to make good our promise to your Mr. C. Pastene of giving him an opportunity of purchasing some of these goods.

“We have just recently closed for 1000 cases with J. M. McNiece & Co., of New York at \$3.50 per 100 F. O. B. San Jose. These people requested a larger quantity which we would not consent to.

"Awaiting to hear from you promptly on his return, we are,

"Yours very truly,
"GRECO CANNING CO.

"By _____."

"P. S.—Since dictating the above letter we have booked orders for Ignais-Gross of New York City for 1000 cases who wanted 2000 and Pornell-Proves for 1000 cases."

There was then received in evidence and marked Defendant's Exhibit "V," the following letter:

Defendant's Exhibit "V."

("Letterhead P. Pastene & Co., Inc., Boston.)

"April 22d, 1916.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"The writer has just returned from his western and Mexican trip and finds your letters of March 29th and April 10th, contents of which he immediately read. [63—37]

"NAPLES STYLE SALSA: We are pleased, of course, to note that you are going ahead in the manufacture of this article and that you do not see any reason why you cannot duplicate the samples of Cirio and Piedigrotta brand which we sent you, that is say, make an article at least as good. We hope of course that yours will be even better.

"Also note what you state in reference to having already booked considerable goods and that you are waiting to hear from us as to the quantity which

we will take at the price you name of $3\frac{1}{2}\text{¢}$ per tin f. o. b. San Jose, goods packed in cases of 100 tons. Now we do not wish to discuss the price because we believe that you will at least make us as low a price as you make to anybody and upon that assurance we will be very glad to pass you an order for such quantity as you feel that you can afford to book, not less than 1000 cases and we should very much prefer to have it several thousand cases. Tell us how much you can spare for us. It is of course understood, as you clearly state, the goods are guaranteed to be strictly A No. 1.

“By the way, you intend of course to put a leaf of sweet basil in each tin such as the Naples goods, do you not?

“Are anxiously waiting to hear from you so that we can be assured that we will not be left out in this matter.

“Writer wants to take this opportunity of thanking your Mr. Greco for the extreme courtesy and kindness shown to the writer on his visit to San Jose, assuring you that if the opportunity offers, such as for example you or your brother coming to Boston, he should be delighted indeed to have the pleasure of reciprocating in part if possible your most courteous hospitality.

“Looking forward to hearing from you shortly, we beg to remain,

“Yours respectfully,

“P. PASTENE & CO., INC.

“Per C. A. P.” [64—38]

(Testimony of Victor V. Greco.)

WITNESS.—(Continuing.) None of our goods were ever rejected.

The COURT.—What is this little leaf mentioned in here?

A. That is a little herb; it is a little leaf like musk, and they place one of these in each tin and it gives it a flavor.

There was next received in evidence and marked Defendant's Exhibit "W," the following letter.

Defendant's Exhibit "W."

"April Twenty-eight, 1916.

"P. Pastene & Co.,

"69 Fulton St., Boston, Mass.

"Gentlemen:—

"Attention Mr. Chas. Pastene.

"Your esteemed favor of the 22nd to hand and contents carefully noted. We are enclosing our form of contract, the same as we have entered into with other firms. We will leave the quantity blank for you to fill in, quantity not to exceed 3000 cases, 200 tins to the case.

"It was our intention to pack these goods 100 tins to the case in fiber cases, but other buyers preferred a package similar to the Italian, that is 200 tins to the case and in wooden cases as this seems to be the road of least resistance.

"It is optional to you whether you want it with the Basilico or not, but we are to be notified on acceptance. If it be your preference to have goods packed 100 tins to the case in fiber cases, it will be

satisfactory to us as a matter of fact we prefer it, as it will enable us to ascertain whether this style package will take. There will be no difference in cost as the packing in fiber cases will cost as much as the other, but there will be considerable saving in freight rate, which will be to your advantage.

“We have advanced our price to \$7.50 per case, since April 10th and have been successful in book-
ing business on these basis. In keeping with our
promise we will book your order at [65—39] our
opening price of \$7.00.

“We wish to thank you for your kind remarks and
will promise you to pay you a visit at any time that
either one of us happen to be anywhere within your
vicinity and assure you that when we do that the
pleasure shall be all ours.

“Thanking you for your most courteous letter and
trusting to see you again in the near future, we
wish to remain,

“Yours very truly,

“GRECO CANNING CO.

“By _____.”

There was then received in evidence and marked
as Defendant’s Exhibit “X,” the following letter:

Defendant’s Exhibit “X.”

“May Eleventh, 1916.

“P. Pastene & Co.,

“Boston, Mass.

“Gentlemen:

“As we have had no letter from you in reply to
ours of April 28th, and sufficient time having

elapsed, we were obliged to-day to wire you as per enclosed copy of telegram and we look for an immediate answer, which we hope is forthcoming.

“Our actions in this matter are caused by other inquiries that we have and which we have refrained from closing due to the pending negotiations between us.

“Yours very truly,

“GRECO CANNING CO.,

“By _____.

“VVG/EH.”

There was then received in evidence and marked as Defendant's Exhibit “Y,” the following telegram:

Defendant's Exhibit “Y.”

“San Jose, Calif., May 11, 1916.

“P. Pastene & Co.,

“Boston, Mass.

“Wire prompt decision answering our letter April Twenty-eight immediately.

“GRECO CANNING CO.” [66—40]

There were then received in evidence and marked by the respective exhibits at the head thereof, the following letters and telegrams:

Defendant's Exhibit “Z.”

“Boston, Mass., 627 PM May 11, 1916.

“66 SFC 9

“The Greco Canning Co.,

“San Jose.

“Wrote you fully last Monday accept three thousand cases.

“P. PASTENE CO., INC.,

“3:58 P. M.”

Defendant's Exhibit "AA."

(Letterhead P. Pastene & Co.)

"Boston, Mass., May 12th, 1916.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"Yesterday afternoon we received your wire reading 'wire prompt decision answering our letter April 28th immediately' and although we thought our wiring you really unnecessary in view of the fact that we wrote you fully on Monday last sending you contract for 3,000 cases of Naples style salsa, nevertheless, we telegraphed you as per copy of our message herewith enclosed which undoubtedly reached you promptly.

"Yours respectfully,

"P. PASTENE & CO., INC.,

"Per _____."

Defendant's Exhibit "BB."

"May 8th, 1916.

"The Greco Canning Co.,

"San Jose, California.

"Gentlemen:

"We beg to acknowledge receipt of your communication of April 28th, contents of which had our careful attention. We found [67—41] enclosed the contracts to which you refer and we have filled same in for 3,000 cases and are returning them to you for your approval and signature, asking you to send us of course, one copy for our files.

“You will notice that we have inserted in a couple of places additional words to clear the meaning of what we had no doubt was exactly your intent in said contract but we thought that possibly it would be best for all concerned to have the matter clearly stipulated.

“The first is in reference to approval of sample. Naturally, in view of the fact that you have never made any of this article and therefore we have no means of knowing what you will put up, it is essential that we have an opportunity to pass judgment on the type of article you will manufacture by having sample tins sent for approval or rejection.

“The second is in reference to guarantee. We understand that it is customary for California canned good to be guaranteed against swells exceeding half of one per cent. We have incorporated that in the contract.

“The last is in reference to payment and we have no doubt that it is exactly what you meant in your contract but we thought we would clear it, that the payment is to be made on draft against documents or shipping receipt only.

“BASILICO: We will want a leaf in each tin and have added that on to the contract.

“SHIPPING CASES: We decided to have a part of them come in fibre cases and a part in wooden cases, this to find out how the fibre cases would go as being a new style package, we cannot tell offhand.

“SHIPPING INSTRUCTIONS: After we will have approved of [68—42] sample, we will give you the details in reference to these.

“Thanking you for taking the matter up with us and trusting this is only a forerunner for business of very much value and asking if you have any surplus pack you give us an opportunity as soon as you know what your pack will amount to, we beg to remain,

“Yours respectfully,

“P. PASTENE & CO., INC.,

“Per C. A. P.

“CAP:EMB.

“Enc.”

Defendant's Exhibit “CC.”

“May Thirteenth, 1916.

“P. Pastene & Co.,

“Boston, Mass.

“Gentlemen:

“Your esteemed favor of the 8th enclosing contracts to hand. We note your few corrections which we approve.

“And it is only in your case where we have succeeded in interesting buyers in fiber cases, and therefore due to the small quantity, that will be required, we are in doubt whether we may succeed in getting such a small quantity, however, we are very much interested and if it is possible to secure them, we will fill your order accordingly, otherwise we may have to put all in wooden cases, which we hope will be satisfactory.

“Another point on which there is a very small doubt, but that we will succeed and that is the Basilico. We have every reason to believe that we will succeed in growing sufficient to enable us to use it in our pack, as we have some growing now, and it seems to be doing well, of course it is hard to foresee what may happen. Offhand we would say that 99 chances out of 100, that we will be successful in adopting it. We wish to mention [69—43] this, so as not to disappoint you if we did not succeed, so we are therefore signing the contract as it stands.

“Yours very truly,

“GRECO CANNING CO.,

“By _____.”

Defendant's Exhibit “DD.”

“May 20th, 1916.

“The Greco Canning Co.,

“San Jose, Calif.

“We beg to acknowledge receipt of yours of May 13th with enclosed signed contract.

“FIBRE CASES: If you do not put the article up in this package, wooden cases will be all right.

“BASILICO: There should be no difficulty on this because it grows very profusely anywhere and we know it grows very freely in California so we do not anticipate any trouble on this score. Of course, if it is impossible for you to obtain the leaf, naturally, we can only accept what nature provides.

“We are pleased indeed to have been able to make this small contract with your good selves since we

(Testimony of Victor V. Greco.)

believe it to be but the forerunner of a very large and profitable business. Later on, after your pack is assured, we wish you would remember that we will without question want more goods and we hope you will give us the first chance at it but when you send us your sample, you will probably be in a position to know how much more of the goods you could offer.

“Thanking you in advance for this consideration, we beg to remain,

“Yours respectfully,

“P. PASTENE & CO., INC.

“Per C. A. P.

“CAP:EMB.” [70—44]

Thereupon the following took place:

Mr. McNAB.—Q. With respect to the furnishing of the basilico, what was done?

A. We adopted it where it was possible, at times when we were able to get it. In other words, in part of the pack, we had basilico, and part of the pack we did not. I don't recall whether, in Mr. Pastene's case, whether the basilico existed.

Q. Throughout this correspondence, Mr. Greco, there is a reference to samples. Did you send samples forward from time to time? A. Yes, sir.

Q. Were any of these goods ever rejected?

A. No, sir.

Thereupon there were received in evidence and marked by the respective exhibits at the head thereof, the following letters and telegrams:

Defendant's Exhibit "EE."

"July 21st, 1916.

"The Greco Canning Co.,

"San Jose, Calif.

"Gentlemen:

"How soon do you expect to be able to send us samples of the new Salsa, on which we have had the pleasure of making a contract with your good selves?

"Trusting to hear from you with good news by return mail, we beg to remain,

"Yours very respectfully,

"P. PASTENE & CO., INC.

"Per C. A. P."

Defendant's Exhibit "FF."

"July Twenty-sixth, 1916.

"P. Pastene & Co.,

"Boston, Mass. [71—45]

"Gentlemen:

"Answering your esteemed favor of the 21st, we will endeavor to forward you samples immediately during the first pack of this article. The tomato pack season in this section is later than elsewhere, as you know, starting in on or about September 1st. We have made all necessary preparations and we are now in a position to handle a large pack, providing crop conditions are favorable.

"With kindest regards, we remain,

"Yours very truly,

"GRECO CANNING CO.,

"By _____.

"VVG/EH."

Defendant's Exhibit "GG."

"Sept. 28th, 1916.

"The Greco Canning Co.,

"San Jose, Calif.,

"Gentlemen:

"Since yours of August 29th, we have heard nothing further from you in reference to Salsa.

"At that time you wrote us that you expected to be running on this article about September fourth and that samples would be forwarded to us immediately. We are, of course, therefore surprised at not having heard from you by now and are writing asking you to be good enough to let us hear from you with the samples in question, as we are anxious to obtain the goods, as is but natural.

"We shall appreciate having you write us fully and frankly in reference to any matter or detail on which you think that you should communicate for the mutual interests of both, assuring you in advance that any remarks you may make will have our full consideration in all fairness and justice.
[72—46]

"Thanking you in advance, and awaiting to hear from you promptly, we beg to remain,

"Yours respectfully,

"P. PASTENE & CO.,

"Per C. A. P.

"CAP:EMB."

Defendant's Exhibit "HH."

									"1419"
									Oct. 30/16
Contract.		P. Pastene & Co.							Oct. 31/16
		Boston, Mass.							
		Pastene & Co.							Oct. 31/16
	Prompt.	New York.							
	1 ½ %							P. Pastene & Co.	
	S/D.B/							New York, N. Y.	
665	Cs. Salsa di Pamidoro	6 oz.	7.60	4655.00					
	Less 1 ½ % Cash			69.82					
									<hr/>
									4585.18
fob	San Jose.								
		Reg."							

Defendant's Exhibit "II."

"Jan. 23/17.

"Greco Canning Co.,
"San Jose, Calif.
"Gentlemen:

"We have had two complaints that two cases of your sauce were unlabelled. We are not sure that the two cases in question are all of the lot which were so shipped, namely,—without labels—for of course we have not examined each case, and so it may turn out that later on we will have more complaints of this nature, in which case we shall advise you. Meanwhile wish you would provide for the two cases in question by sending us sufficient labels so that we can have them attached. If you prefer

you might send enough to take care of five cases, to cover any possible similar contingency.

“Yours respectfully,

“P. PASTENE & CO., INC.

“C. A. P.

“CAP/NK.”

Defendant's Exhibit “JJ.”

“January Thirty-first, 1917.

“P. Pastene & Co.,

“New York, N. Y. [73—47]

“Gentlemen:

“We have your favor of the 23d informing us that so far you have located two cases of our Salsa unlabeled. We will not dispute this fact, however we cannot see how this occurred and undoubtedly it was due to some error in the warehouse. We are shipping to-day sufficient labels for same which we trust will reach you in time.

“Yours very truly,

“GRECO CANNING CO.,

“By _____.

“VVG/EH.”

Defendant's Exhibit “KK.”

“Feb. 9/17.

“The Greco Canning Co.,

“San Jose, Calif.

“Gentlemen:

“We thank you for yours of Jan. 31st and we are to-day in receipt of the labels which you so kindly

sent us, and for which we thank you.

“Yours respectfully,

“P. PASTENE & CO., INC.

“U.

“RU/NK.”

Defendant's Exhibit “LL.”

“San Francisco, March 27, 1917.

“Greco Canning Company,

“San Jose, California.

“Dear Sirs:

“I am sorry that I missed your Mr. Greco when he phoned several days ago. I am also sorry that he did not advise me in advance of his visit to San Francisco, so that I might have arranged to be on hand to meet him.

“I trust that he expects to be in San Francisco again in the near future, and that he will, as per understanding, advise me [74—48] a day previous, either by mail or telephone, where I can meet him, as I am of course anxious to have his decision in the matter which I took up with him in San Jose.

“May I ask that you let me know at least approximately when I may expect to see Mr. Greco. A letter addressed to this office or to my Berkeley address will reach me without delay.

“Thanking you for the courtesy of a prompt reply, and renewing my expressions of regards, I beg to remain,

“Yours very truly,

“P. R. PASTENE,

“PRP/W.”

Thereupon the following took place with respect to Exhibit “LL”:

(Testimony of Victor V. Greco.)

Mr. McNAB.—Q. Mr. Greco, this alludes, in its language, to having your “decision in the matter which I took up with him when in San Jose.” During the month of March, 1917, did you have an interview with Mr. Pastene in San Jose? A. Yes, sir.

Q. Concerning what matter?

A. Concerning a new contract for 1917 pack goods.

Q. Can you state the conversation?

A. Why, the sense of the conversation I can, yes. Mr. Pastene called in to see me, and in regard to entering into a contract for 1917 pack goods on the lines that we had had some correspondence, that is our offer to them as shown in one of our letters, and then followed up by a telegram which they had not accepted and our offer withdrawn. The fact was this, that when Mr. Pastene came to my office, the market for future pack, 1917 pack, was advanced considerably, I would say that we had had by that time made sales at \$14.00 a case for 1917 pack goods. Mr. Pastene then wanted me to make good what I had promised him in this letter, a new contract at \$10 a [75—49] case, which I refused to do.

Q. Now, prior to this conversation had there been any threat or intimation that you were to be sued on account of the failure to perform this contract?

A. That took place later.

WITNESS.—(Continuing.) Neither Mr. Pastene nor anybody on his behalf conveyed to me any intimation of dissatisfaction with our failure to supply other than as stated in this correspondence

(Testimony of Victor V. Greco.)

which you have read. The first intimation I had of litigation was after the meeting that we had in San Francisco at luncheon where I entertained him subsequent to this conversation—subsequent to the letter addressed to me from the Monadnock Building which you have just read.

There was next received in evidence and marked Defendant's Exhibit "MM," the following letter:

Defendant's Exhibit "MM."

"March 29, 1917.

"P. R. Pastene, Esq.,

"c/o Porterville Magnesite Co.,

"387-391 Monadnock Bldg.,

"San Francisco, Cal.

"My dear Mr. Pastene:

"Thanks for yours of the 27th instant and shall be in town on Saturday next, the 31st instant, and will call upon you at 1 o'clock with the hope that I shall have the pleasure of entertaining you at luncheon, thereby affording us an agreeable opportunity of discussing matters.

"Hoping that this will be a convenient time for you, and with kind regards, we are

"Yours very truly,

"GRECO CANNING CO., INC.

"By _____.

"CC: P. R. Pastene,

"c/o R. S. Edwards,

"2241 Glenn Ave.,

"Berkeley, Calif." [76—50]

There was then received in evidence and marked Defendant's Exhibit "NN," the following letter:

Defendant's Exhibit "NN."

"Oct. 14-16.

"The Greco Canning Co.,
"San Jose, California.

"Gentlemen:

"REGISTERED.

"We confirm our telegram of October 5th and letter of October 7th, as well as the various letters written you prior to those dates and although fully a week has expired since our last letter was written and nine days since sending our telegraphic request for samples, you have so far neglected to communicate with us on this subject.

"We are informed you, and others as well, are now working tomato sauce, etc.—that you have already furnished other New York buyers with samples of your product and this information, in conjunction with the manner in which you are treating us is a cause of considerable surprise—let alone disappointment.

"After giving the matter considerable thought, we are led to believe only one conclusion is possible but knowing you as we do, we are loath to think and certainly do not want to, and cannot convince ourselves, that your silence is due to studied negligence.

"We must have an immediate response to our various communications and must also ask you once again that unless you have already forwarded our samples of your product, that you please be kind

(Testimony of Victor V. Greco.)

enough to rush them forward by express without any further loss of time.

“We feel sure in view of the patience shown your good selves so far, you will make it unnecessary for us to write you on this topic again.

“Yours respectfully,

“P. PASTENE & CO. INC.

“ALZ: EMB 10-24.” [77—51]

WITNESS.—(Continuing.) The occasion for delay in sending samples was as follows: We did not have the samples at the time because each batch as stated before, that the product was not uniform; therefore, had I sent him a sample of a product packed at a particular time that the goods were going elsewhere, the shipment would not have corresponded to that sample, so I delayed in sending him samples so as to give him samples of the product that I was going to be able to deliver to him by correspondence—that the delivery was going to correspond with the sample.

There was then received and marked as Defendant's Exhibit “OO,” the following letter:

Defendant's Exhibit “OO.”

(Letterhead Greco Canning Company.)

“San Jose, California, October 21st, 1916.

“P. Pastene & Co.,

“69-75 Fulton St.,

“Boston, Mass.

“Gentlemen:

“Your registered letter of the 14th to hand. We

(Testimony of Victor V. Greco.)

must admit that you are perfectly justified in sending this, however, there was one of our letters in the mail when yours was forwarded. We are not taking the trouble to look up what we wrote you at that time, but we believe we explained the situation.

“We did not forward you samples for the reason that we had so much trouble with our Vacuum apparatus, that during these interruptions it was difficult to get the uniformity in the article and therefore had we sent you a sample and then the goods would of been different, there would have been some dissatisfaction. We are now operating this apparatus at about 25% capacity, as to work it continuously as the way we intended can not be done.

“We will send you some samples now that we are able to get [78—52] a more regularity, and will possibly try and get you out a car next week if everything goes right. There is an embargo on the Sunset Gulf shipments.

“Kindly advise us if you want this shipped all rail and to what destination.

“Awaiting your reply, we remain,

“Yours very truly,

“GRECO CANNING CO.

“By V. V. GRECO.

“VVG-LFL.”

Thereupon the witness testified as follows:

Mr. McNAB.—Q. Mr. Greco, even if you had been able to run your plant at the capacity which you had originally calculated when you commenced your operations for 1916 were the rains and frost to which

(Testimony of Victor V. Greco.)

you have testified such that there was no product there to operate the cannery? A. If we had—

The COURT.—(Interrupting.) Read that.
(Question read.)

A. Yes, sir, there would not be sufficient product, I might state, however, Mr. McNab, that we would probably have packed a small percentage higher of more goods than we actually packed if—

The COURT.—(Interrupting.) Q. If what?

A. If we had not had trouble with the machinery.

Mr. McNAB.—Q. And now, Mr. Greco, let me ask you, what quality of tomato—no, I withdraw that—is there any special quality of tomato that is required in order to make the Salsa de Pomodoro?

A. No special quality of tomato, except that tomato must be at its best when it is good, mature. In other words, a very early tomato, ordinarily the farmer will pick it before it is completely matured so as to begin shipping, and later on in the season, when the sunshine is not sufficient, why you do not then get the same color again and it is not adapted for that particular [79—53] purpose because you require a very highly matured red tomato to make a good product.

Q. And in order to make this product was it, or was it not, your effort to secure the tomatoes in exactly the prime condition for that purpose?

A. Yes, sir.

Q. And after the rain and the frost had fallen on these tomatoes, were they in a condition to make this product? A. No, sir, they were not.

Mr. McNAB.—I think that is all.

(Testimony of Victor V. Greco.)

Cross-examination.

To the best of my recollection the frost occurred early in November, 1916. Ordinarily, the season is not over until the 1st of December. We have operated as late as the 10th of December, which we can show by some of our records. I am now speaking with respect to frost. I think we commenced making Salsa De Pomodoro as soon as we got the tomatoes. We were anxious to try out our new equipment. That must have been about the first, the beginning of the month of September, because the tomatoes in the Santa Clara valley mature and deliveries are begun to the canneries on or about that time. They vary from August 25th to September 9th, according to climatic conditions. I can by referring to my records tell at what date we began to get our deliveries. (Witness referring to book.) On September 6th. Besides Salsa De Pomodoro we packed tomatoes de Luxe style, Spanish sauce, which is a local product which I had packed since 1913, the year that we established the business. We owned the brand known as De Luxe. We packed a solid pack under the "De Luxe" brand. We packed a solid pack for that season. A solid pack is the peeled solid tomato in a can. For the solid pack we use the same as we use for the Salsa [80—54] De Pomodoro, that is to say, the finest quality of tomatoes. I don't remember how many acres of tomatoes we had contracted for before the season of 1916.

A colloquy between Court and counsel here occurred with respect to the production of the contracts

(Testimony of Victor V. Greco.)

for the purchase of tomatoes prior to 1916. Thereupon the following took place:

The COURT.—It is not a question of the contracts. He is asking him about the number of acres that he contracted for.

Mr. COOLIDGE.—That is the only way that we will establish that fact of the acreage because these contracts show the acreage.

The COURT.—These businesses are not run in any haphazard way.

Q. You know how many acres you have contracted for, you know it in a general way, anyhow.

Mr. McNAB.—Q. Are the contracts in writing or oral? A. They are in writing.

Q. All of them?

A. Most of them, some oral, but most of them are in writing, but this dates back to 1916, Mr. McNab, if you were to ask me how many acres contracted in 1919, I could answer that immediately, but in 1916, it is four years ago, we have changed our office, moved into a new office, I don't know whether those records are available and if they are why he would have produced them.

The COURT.—Q. How much of a solid pack did you put up that year, your books show that, I suppose?

A. Our books would show it, but it would take sometime to dig it up in the sales, the book which is on the desk there.

Mr. LANNIGAN.—The defense here is short pack, one defense is a short pack, which, of course,

(Testimony of Victor V. Greco.)

means a pack less than estimated because of destruction of crops.

The COURT.—Either shortage or destruction of crop. [81—55]

Mr. LANNIGAN.—Shortage or destruction of crop and we are entitled to go into this matter.

The COURT.—It is perfectly obvious. I see your purpose and it is an entirely proper one.

Mr. McNAB.—If you care to proceed with another branch of it we will try to get you any information we have.

Mr. LANNIGAN.—Well, what I wanted to get at particularly on cross-examination was this very question of short pack.

Mr. McNAB.—Well, I will state to your Honor that that was an element that I wanted to go into myself and I had Mr. Greco make a thorough search at my request to see if they could be found.

The COURT.—Well, it is a showing that they must make. I could not find that there was any short pack from any evidence here now.

Mr. McNAB.—The witness testified that he had a sufficient quantity—

The COURT.—(Interrupting.) But Mr. McNab, that would not mean anything to me unless I saw his figures. These businesses are not run in their heads, they are run by records, they have got records of these things.

A. Your Honor, the amount of pack, of solid packs will be shown on that sale book there, everything that we sold, not only solid pack, every other com-

(Testimony of Victor V. Greco.)

modity that was manufactured is in that book, only I have not computed it, I did not know that I had to answer any such question and therefore I am not prepared, but it is in that book right there.

Mr. LANNIGAN.—I might ask another question, if you Honor will allow me to do so while—

Mr. McNAB.—(Interrupting.) Here is the book containing everything that we have.

The COURT.—Well, counsel is not required to search it out. [82—56]

Mr. McNAB.—We will lend any assistance that we can, if your Honor please. The witness has testified that he had tomatoes there in the field under contract that he could not use because they had rotted.

The COURT.—Go ahead.

Mr. LANNIGAN.—Q. Well, now, Mr. Greco, who are the firm of Pernell and Pierce—would you let me see exhibit “T,” please—have I got the name right?

A. I have a slight recollection, and just by a strange coincidence in looking up my files I find a contract which I will show you. I see what you are digging at, I can explain that very nicely.

The COURT.—Just answer the questions.

A. I want to refresh my mind as to whether or not that is the proper name because I have a contract with McNiece. Mr. Redding, I would like to have the McNiece contract. It is in my brief case. With your permission, your Honor, I might go and dig it up.

(Testimony of Victor V. Greco.)

Mr. LANNIGAN.—It is in a letter of April 4, 1916, from Greco to Pastene, I think.

The COURT.—Well, it was mentioned, the name was mentioned in a letter from Pastene to Greco.

Mr. LANNIGAN.—Here is the letter that I am referring to. It is a letter of April 10, 1916 to Pastene and Company from Greco Canning Company: “P. S. Since dictating the above letter we have booked orders for Ignace Gross of New York and Parnell”—

A. It is Cornell, that is what I was referring to, which I will show was on McNiece, which was on McNiece’s contract.

The COURT.—Show it to counsel.

A. And Mr. Lannigan, I will explain that to you until it is clear.

Mr. LANNIGAN.—(Interrupting.) Q. Just a moment, let me see it.

A. It is made out to Cornell, and this is written on the face of it, [83—57] that is McNiece that tranferred that contract to Cornell, those are both copies of the same contract.

Q. Well, Mr. Greco, did you make a contract with Cornell and Gross?

A. No, sir, I did not, it is the McNiece contract that applies to the Cornell shipment.

Q. You never shipped any goods to Cornell?

A. I don’t recall, I don’t think so, if they were shipped to Cornell they must have been billed to McNiece because it is the same transaction.

(Testimony of Victor V. Greco.)

Q. But you are not sure whether they were shipped to Cornell or not?

A. Whether they were shipped to Cornell or McNiece it is the same transaction as shown by that contract.

Q. Won't your books show?

A. Yes, sir, my books will show.

Q. Can you show the shipment that was made under the Cornell contract or the McNiece?

A. Yes, sir.

Q. Which book is that in?

A. It is a book right here.

The COURT.—Gentlemen, this must go on record in the proper way and let the examination be between counsel and the witness so that we will get it on the record.

Mr. LANNIGAN.—Q. Now, Mr. Greco, I find, on page 446 of your miscellaneous invoices from January 1, 1919, beginning on page 551—

A. (Interrupting.) Mr. Lannigan, the description on that book is wrong. I will explain it to you.

Q. This is simply for the purpose of identifying the book, that is all. This book which has on it what I read “miscellaneous invoices, etc.” at page 446, at the top of the page what purports to be a bill, a statement?

A. I will explain what that is, what that book is, Mr. Lannigan, that book is an exact—

Q. Just a moment.

The COURT.—Just answer the question.

(Testimony of Victor V. Greco.)

Mr. LANNIGAN.—Q. Will you tell me what that entry on page 446 [84—58] at the top is?

A. This is an exact copy of the invoice of that particular shipment.

Q. Now, this, Mr. Greco, shows the shipment to J. M. or J. H. McNiece & Company of New York of 500 cases of Salsa de Pomodoro, 6 ounces at 7.35 a hundred less 11½ cash, net 3447.50? A. Correct.

Q. And under what contract was this shipped?

A. McNiece & Cornell.

Q. McNiece & Cornell?

A. Yes, the McNiece contract with the endorsement on the face of it in red ink that those goods applied to the Cornell sales that McNiece had made to Cornell.

Q. Then, did you deal direct with McNiece?

A. I dealt with McNiece and not with Cornell.

The COURT.—Q. Who is that contract with?

A. The contract is with McNiece.

Mr. LANNIGAN.—The contract purports to be with—it is impossible to tell, your Honor, because it says—the buyer is described as H. P. Cornell by blank, and written in ink over buyer is J. M. McNiece & Co. I will offer in evidence, your Honor, the contract dated April 11, 1916 purporting to be a contract between the Greco Canning Company and J. M. McNiece & Company, New York City containing a red ink endorsement and ask that it be marked Plaintiff's Exhibit No. 1.

Mr. McNAB.—What is the purpose of this?

Mr. LANNIGAN.—Well, the witness produced it.

(Testimony of Victor V. Greco.)

The COURT.—It is in connection with his examination. A. Yes.

Mr. McNAB.—It is one of the contracts as listed on my list, these goods were sold to McNiece, McNiece had evidently sold them to Cornell and the contract remained with McNiece and shipment made to McNiece. [85—59]

Mr. McNAB.—That is all written in red ink on the front of it?

A. Yes, right on the face of it and endorsement there.

Mr. LANNIGAN.—This contract, your Honor, is a contract between J. M. McNiece & Company and the Greco Canning Company for a thousand cases of Salsa Di Pomodoro, f. o. b. San Francisco.

The COURT.—What is the date of it?

Mr. LANNIGAN.—It is dated April 11, 1916.

The COURT.—The same year.

Mr. LANNIGAN.—Yes, sir.

Plaintiff's Exhibit No. 1 is as follows:

Plaintiff's Exhibit No. 1.

"CONTRACT.

San Jose, California, April 11, 1916.

THE GRECO CANNING CO., of San Jose, California hereinafter called seller, this day sold, and J. M. McNiece & Company, New York City, New York, hereinafter called buyer, this day bought the following described goods—1916 pack.

One Thousand cases Salsa De Pomodoro packed

200 tins to the case, six (6) oz. each, in wooden cases at Seven Dollars (\$7.00) per case.

TERMS: The above named goods are F. O. B. cars San Francisco less 1½% cash discount. Sight Draft Bill of Lading attached.

GUARANTEE: Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug Act, June 30, 1908; or the California Pure Food Act, March 11, 1917. Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers label. Quality to be of same consistency as the Imported, of good Flavor and color. Samples to be submitted prior to shipping and shipment to correspond with samples.

CONDITIONS: Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and cease. Usual swell guarantee.

Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to pay said invoice on demand or to protect draft for invoice value on presentations. Seller agrees to store said goods and insure them

(Testimony of Victor V. Greco.)

[86—60]at buyer's expense, should buyer so desire, until December 1, 1916.

Seller: GRECO CANNING CO.,

By V. V. GRECO.

Buyer: H. P. CORNELL,

By _____.

J. M. McNIECE & CO.,

(Written over "H. P. Cornell").

(Endorsed in red ink on face:)

"This order is intended for H. P. Cornell of New York, and will be filled on condition that these goods will be delivered to them at price stipulated in this contract."

Mr. LANNIGAN.—Q. Now, Mr. Greco, I show you what purports to be a contract between yourself and McNiece & Company?

A. Mr. Lannigan, it is the same contract, that is the same contract as the one you have, it is only an extra copy.

Q. Well, Mr. Greco, will you look at that and see whether it is a copy or not, I don't think it is?

A. Let me see the other one—my list please—I want a copy of it—McNiece 3000, this is one thousand—I beg your pardon—these are separate contracts. It is one for two thousand and one for one thousand, making a total of three thousand as shown on my list, the one thousand was intended for Cornell and two thousand to McNiece, but the shipments were made all to apply against both of these contracts as the contracts had been entered into with McNiece and not Cornell.

(Testimony of Victor V. Greco.)

Mr. LANNIGAN.—Now, I offer in evidence the contract dated April 11, 1916, between the Greco Canning Company and J. M. McNiece & Company for two thousand cases of Salsa Di Pomodoro, F. O. B. San Francisco and signed Buyer: J. M. McNiece & Co. by E. L. Heebner, and ask that that be marked Plaintiff's Number 2. (Tr., pp. 75 and 76.)

There was now offered in evidence and marked as Plaintiff's Exhibit No. 2 the following contract: [87—60A]

Plaintiff's Exhibit No. 2.

“CONTRACT.

San Jose, California, April 14, 1916.

THE GRECO CANNING CO., of San Jose, California hereinafter called seller, this day sold, and J. M. McNiece & Co., New York City, N. Y. hereinafter called buyer, this day bought the following described goods—1916 pack, future delivery.

Two Thousand cases Salsa Di Pomodoro packed 200 tins to the case six (6) oz. each, in wooden cases at Seven Dollars (\$7.00) per case.

TERMS: The above named goods are F. O. B. cars San Jose, less 1½% cash discount, Sight Draft Bill of Lading attached.

GUARANTEE: Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent in writing of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug

Act, June 30, 1906; or the California Pure Food Act, March 11, 1907. Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers label. (Quality to be of same consistency as the Imported, of good flavor and color. Samples to be submitted prior to shipping and shipment to correspond with samples.)

CONDITIONS: Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and cease. Usual swell guarantee.

Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to pay said invoice on demand or to protect draft for invoice value on presentation. Seller agrees to store said goods and insure them at buyers expense, should buyer so desire, until December 1, 1916.

Seller: GRECO CANNING CO.,

By V. V. GRECO.

Buyer: J. M. McNIECE & CO.

By E. L. HEEBNER." [88—60B]

Thereupon the cross-examination proceeded as follows: I am familiar with the practical operations of this machinery. I am not a mechanic, but I have had mechanical experience; have been connected with machinery since I was 18 years old.

(Testimony of Victor V. Greco.)

I am not an engineer. We bought this machinery from Mr. Krenz; he manufactured it. We began to have trouble with it as soon as we began to try it out, off and on. It appeared that the tubes in this apparatus were too small, that is, the radiating tubes were too small, and that this product, tomato pulp, had a tendency on account of the small size of the tubes to remain dead in these tubes and the heat around the tubes would scorch it. Had we endeavored to make a liquid product why then we would not have had that trouble, but due to the fact that we wanted to make a high class article because that was what we had sold and agreed to deliver, in concentrating it and leaving it in the pans a sufficient time to properly concentrate it, it would burn on us. It actually burned so hard that we had to drill it out. Sometimes it would take a half a day to do it. It all depends on how hard it had burned into these tubes. Absolutely we actually had to use an electric drill, an electric metal drill to get the stuff out. It happened from time to time, more frequently when the engineer would endeavor to turn out the product a little too thick, then it burned harder. If he would catch it just at the right time and turn out a more liquid substance, why, then, we did not have that trouble. The concentration of solid with Salsa De Pomodoro was about 24 per cent, about a concentration of from five to six to one. That all depends on the nature of the raw material. That made a very thick paste. You could turn a can upside down and it would not run out. You would have to get a spoon to take it out. It would not

(Testimony of Victor V. Greco.)

run; it was almost like putty. That is the real Salsa [89—61] de Pomodoro. There is nothing else in it but tomato, excepting basilico, when it is requested, and a little salt, no condiments of any kind, nor spicing. Sometimes we stayed up as late as 1 o'clock at night trying to fix it, and even later than that— one or two o'clock at night; not to try to fix it myself, but to watch my men to see that they would fix it. I took an interest in it to see that it was done. I stayed there as late at that time to see that the work was done or was being done. Nothing else went wrong with it besides this burning in the pipes, excepting a shortage of crop, if you are referring to that; nothing else was wrong with the machinery.

Mr. LANNIGAN.—Q. Did you ever have any trouble with the crusher, for instance?

A. Oh, yes, that was in the other machine, that is like any machine, you could buy an automobile and sometimes it goes wrong because your carburetor is clogged up, those are minor troubles.

Q. Did you have any trouble with the crusher?

A. Oh, we have them every day.

The COURT.—Q. That is simply incident to the ordinary operation, isn't it? A. Yes, sir.

Mr. LANNIGAN.—Q. Well, what proportion of the time, Mr. Greco, was this machinery in operation and working in good shape?

A. What proportion of the time?

Q. Wasn't it working in good shape most of the time? A. No.

(Testimony of Victor V. Greco.)

Q. It was not. A. No.

I will explain that in this manner, Mr. Lannigan: If the finished product that we were getting out of the apparatus was more of a liquid nature then our troubles were less. Any time that we wanted to improve upon the quality, try to get it back [90—62] to its proper consistency, then we had those troubles. Every time we wanted to make it thick enough, as thick as I would like it, we had that trouble. We ascribed that trouble to the tubes being too small. I did not know at the time that the tubes were too small; we finally learned. Experience taught us that the tubes were too small. As a matter of fact, our tubes now, in the present apparatus, we have doubled several times. We have larger tubes. We made that experimental Salsa De Pomodoro with an open kettle, a small kettle at home. In the making of Salsa the fruit is washed and assorted, crushed, pulped, the skins and seeds are eliminated, reduced to a liquid pulp; it is a pure paste, pure juice, pure pulp of the tomato concentrated. If you want to make a high-class product the concentration is five to six to one. In other words, out of six parts you would get one part; one part paste out of six gallons; you would make a gallon, or out of six pints, one pint; it was reduced that much by evaporation; it was one part solid to six parts water before. I have presented here a list of contracts and deliveries of Salsa De Pomodoro of the 1916 pack in cases. It was both made up by myself and under my supervision. It was made up by the bookkeeper, and I

(Testimony of Victor V. Greco.)

supervised it. The young lady bookkeeper is no longer in my employ. I helped to make it; I looked through the records with her, checked it up. I am sure of my own knowledge that it is complete. I checked up every item in the books. Out of the pack of 1916 I sold to no one except to the people that are listed in that list, and only one sale of two cases without any contracts, which are the two last cases on that list, locally sold in San Jose.

I do not recall the average tonnage per acre of tomatoes in the Santa Clara Valley in the season of 1916, but I think it was about ten tons to the acre. It varies very much seasonally. I [91—63] do not recall what it was in 1916; that is four years off. I might approximate it. I imagine in 1916 it must have been about seven or eight tons to the acre.

Mr. LANNIGAN.—Q. Now, as a matter of fact, wasn't it 9.5, Mr. Greco? A. I don't know, sir.

WITNESS.—(Continuing.) I have been in business in the Santa Clara Valley since 1913, packing tomatoes all that time.

Q. Did I understand you to say that sometimes it took five days and nights to clean out this machinery?

A. I did not say, sometimes, one time it took us five for one pan, but we were using the other one in the meantime.

Q. You were working all the while?

A. Yes, sir; because we had two of these apparatus, but one particular time it took us five days and five nights with a complete crew changing shifts to drill it out.

(Testimony of Victor V. Greco.)

WITNESS.—(Continuing.) Krenz installed the machinery, installed this apparatus, and then sent a man whom he stated was an experienced—the most experienced man that he had in the operation of a vacuum pan, to teach us how to operate this apparatus. We installed the machinery in July or August of 1916. Not only my men were not familiar with it before Krenz men came there to show them, but there was not another man in the United States who was, and Krenz himself was not familiar; it was purely experimental with him; he had never constructed an apparatus for the making of Salsa De Pomodoro. He did not construct this apparatus on our contract—on our order, yes. We got our heads together as to what apparatus close to what they were using in Naples from drawings that we had seen. We tried to duplicate what was being used in Europe; that is, Krenz, myself and other engineers consulted. Krenz made the machinery. He is not a tomato man; he is a [92—64] copper-smith, has a coppersmith establishment. These apparatus are all copper; he makes them for the sugar refiners and for the the milk condensers as well as for distilling alcohol.

I first discovered the fact that the crop of 1916 was going to be short as soon as I saw the first rain some time in October. I testified this morning that it was about the latter part of October, but having refreshed my memory from one of the letters that I have written, the letter stated the 12th of October so it must have happened about that time. I did

(Testimony of Victor V. Greco.)

not make any contracts for tomatoes outside of the Santa Clara Valley. I did not need to make any efforts to get tomatoes in any other part of California at the time we were trying. We entered into contracts for our raw material before the tomato plants were set, say about the month of January, and then it is January, February, March; they do not set them out until May. We made special effort to get tomatoes when we experienced that the acreage that we had, due to rain and frost, was insufficient in all parts of the State. We found out that the acreage was insufficient, due to rain and frost, I would say, some time in October. There was no frost as early as that, but there was the rain and the blossoms, the new—the other setting had dropped off on account of the rain and we could see that the tonnage was going to be considerably decreased.

We tried to get these tomatoes all over the country, all over California, where they are grown, Manteca.

Q. With whom did you deal in Manteca?

A. Sent our buyer out.

Q. What firms did he approach in Manteca?

A. Firms do not sell it, he had to go to the farms.

Q. What farms?

A. Several farms around there that were growing
[93—65] tomatoes.

Q. Do you know who they were?

A. I couldn't recall their names.

The COURT.—Q. Where is Manteca?

(Testimony of Victor V. Greco.)

A. Manteca is in the San Joaquin Valley near Stockton.

Mr. LANNIGAN.—Q. What was the name of the buyer? A. Mr. S. Ortolano.

Q. Where is Mr. Ortolano now?

A. In San Jose.

Q. Is he in your employ? A. Yes, sir.

WITNESS.—(Continuing.) We also made an effort to get tomatoes in San Francisco. I sent a man out to investigate in the markets, if there were any available tomatoes, but could not find any. I did it myself, at times came up myself. I couldn't deal with anybody. I looked around on the market and could not find anything that was suitable except half a dozen boxes and twenty elsewhere that were insufficiently ripened, at the commission houses.

Q. Do you recollect anyone of them that you tried to deal with?

A. With all of them, I made a canvass, I stated, canvassing the commission district.

Q. I am asking you if you will just tell me the name of somebody that you attempted to get tomatoes from in that year?

A. I looked at their product, what they had there, and none of it suited, I had no reason to make any arrangement with them.

Q. You did not try to deal with them?

A. There was nothing to deal with, there was no product there, at the market in the commission district on Washington Street. I mean there was nothing that exactly suited my purpose because they

(Testimony of Victor V. Greco.)

do not make a specialty of supplying canneries; they get the overflow of canneries.

Q. Where else did you make an effort to get tomatoes?

A. Around the Santa Clara Valley, different farmers, and found that [94—66] the different farmers had contracted their acreage with other canneries and there was none available.

The COURT.—Q. You said that there were other canneries and manufacturers that had to prorate, too?

A. Yes, sir, but I was the only one in the Santa Clara Valley that was producing Salsa at that time, I was the pioneer in California.

WITNESS.—(Continuing.) If I am not mistaken the California Packing Company prorated that year, and the Pyle prorated. The California Packing Corporation have 53 plants all over the State of California and Washington. In the Santa Clara Valley they have two, in Santa Clara and in in San Jose, my own town. They are larger packers than we. They are a \$25,000,000 institution. I have never had any access to their records, but from published reports I have learned that they prorated, reports published in the magazines of the canning trade.

Mr. LANNIGAN.—Q. In your letter of October 12th, Mr. Greco, you stated that you were having trouble with your machinery, was that the first time that you had told Mr. Pastene that you were having trouble with the machinery?

(Testimony of Victor V. Greco.)

A. I don't recall whether it was in that letter, Mr. Lannigan.

Q. Well, there is nothing in the correspondence prior to that date with regard to the machinery?

A. Well, I believe that letter stated that I had trouble with the rains, if I ain't mistaken.

Q. So it did, it stated that you also had trouble with the machinery, what I am asking you is, did you tell him before that time that you had had any trouble with the machinery?

A. Maybe I did not.

WITNESS.—Continuing.) According to our records, the last day we packed Salsa was on November 18th. That is the last day we [95—67] handled tomatoes or packed tomatoes. I do not recall whether we were operating on Salsa or tomatoes on that day, but about that time we stopped packing, because we were handling both, peeled tomatoes in cans and Salsa. We put up peeled tomatoes, canned tomatoes and sauce besides.

The COURT.—Q. Can you show from your books, what the size of your solid pack was and how much other product you put up?

A. Your Honor I could show it by segregating those deliveries that are shown in the sales book.

Q. Well, you look into that between now and tomorrow morning so that you will be able to tell us what your entire pack was, that is, what amount of tomatoes were used by you in your entire pack.

A. Yes, your Honor.

Q. And what your acreage was?

(Testimony of Victor V. Greco.)

A. Yes, your Honor. (Tr., pp. 87 and 88.)

The witness being asked if he sold any pulp during the season of 1916 to anybody else in the Santa Clara Valley, explained that certain tomatoes are reduced to puree and that some buyers call that pulp, and others will call it a puree.

Q. Did you sell any of that?

A. I think we did, because we have some of that every year.

WITNESS.—(Continuing.) I do not recall whether we sold any tomatoes, raw material to anybody. I might have because this is what happens: We all buy from each other during a period at the very peak when one man might be stuck and I have not sufficient he will give me his surplus or vice versa. If that took place in that year it is possible that I did, but I don't recall. If I made any sales they will show in the book. [96—68]

Q. Will you go through that book and be prepared to tell us to-morrow whether or not any sales of tomatoes, that is to say raw material, were made during the season of 1916 by you to anybody?

A. Before I will answer that question, I want to ask Mr. Redding, the auditor, if he is able to get that information out for you by to-morrow morning.

Mr. McNAB.—Well, we will get it if it is possible to get it.” (Tr., p. 89.)

Mr. LANNIGAN.—Q. In your letter of December 26, 1916, addressed to Pastene & Company you said, amongst other things, “In the beginning of the season we thought that we would succeed in packing

(Testimony of Victor V. Greco.)

about a 50 per cent delivery, but we regret to advise that we did not succeed in doing so.” What made you think, in the beginning of the season, that you would succeed in packing about a 50 per cent delivery?

A. Well, I suppose that I had in mind the beginning of the season about to be, October, the time I was writing, which was usually about the first part of the season, in other words I didn’t mean to say the beginning, about the first part of the season.

WITNESS.—(Continuing.) We began to pack about the 6th of September. The wording in that letter—what I meant was, during the early part of the season. It was a mistake in putting it “beginning of the season.” The rains that we had is what made me think it at that particular time. When I wrote that letter the word “beginning” was wrong. I meant the early part.

The COURT.—Q. What made you think the early part?

A. That I would only make a 50 per cent delivery?

Q. Yes. [97—69]

A. The troubles with my machinery and then the subsequent rains. The troubles that I was realizing with the machinery and the rains that were apparent early on us and the setting of the blossoms on the plants did not show up well, why, I formed that conclusion.

WITNESS.—(Continuing.) Mr. LANAGAN.—

Q. What was the total tonnage of tomatoes and to-

(Testimony of Victor V. Greco.)

tomatoe products that you packed in the season of 1916?

A. (Tr. p. 90.) The total tonnage of tomatoes and tomato products that was packed in the season of 1916 does not seem to be extended here, but they could be computed very readily because we got the entire daily record of all the number of boxes and weights of the tonnage that we used from day to day during this whole season. I am going to try to have that computation done. I cannot promise you that I will make it because I won't have the time. I got tickets for Tetrazinni tonight. (Tr. p. 90.)

Mr. McNAB.—We will have that computation made to-night if it is possible to get through on time.

WITNESS.—(Continuing.) I have no recollection of how many cases of solid pack I contracted to sell from the 1916 pack. The books will not show what we had contracted, but it will show how many deliveries we made. We have the contracts, but not here.

Mr. LANNIGAN.—I will ask that those contracts be produced. [98—69A]

The COURT.—Yes, produce those contracts, not only for that, but for your acreage too.

WITNESS.—(Continuing.) I do not recall how many cases of tomatoe sauce I contracted to sell from the pack of 1916. We must have the contracts.

We pack the solids and standards. The standard is a lower grade, not more water in it, but juice. Sometimes extra standard.

(Testimony of Victor V. Greco.)

The witness here described standards and grades, puree, pulp, and trimmings, and described the methods used in the manufacture and the amount of concentration in the various packs.

The witness thereupon stated in response to counsel's request that he would endeavor to produce his contracts for 1916 if they could be found, and the examination proceeded:

WITNESS.—(Continuing.) These contracts are usually made out before the season commences. I could not say that they were all made before the season commenced. Referring to those relating to Salsa, those were all made prior to the season, absolutely. They were all made about the time that Pastene's were made, that is, about April and May, and maybe June.

Besides Manteca and San Francisco I endeavored to get tomatoes in the season of 1916 in our immediate vicinity.

Q. In your immediate vicinity. Anywhere else?

A. No, sir.

Q. In your letter of January 5, 1916, when these negotiations were commenced, Mr. Greco, you said, amongst other things, "We are very familiar with the method of making this article"—referring to the Salsa de Pomodoro. Will you explain what you meant by that? A. I knew how to make it.

The COURT.—Q. Did you know the instrumentalities that were employed in its manufacture?

A. Not on a large scale, your Honor, that is, I

(Testimony of Victor V. Greco.)

knew that it required a vacuum cooking [99—70] to make a high-class article, but I didn't know the workings, the construction of a vacuum equipment apparatus, but you can make it on your kitchen stove.

They were using the vacuum apparatus in Italy.

Mr. LANNIGAN.—Q. Isn't it a fact that in 1916 and before that time the Italians made this by sun drying and so on, and didn't use any vacuum apparatus at all?

A. No, sir, you are mistaken, that is not the product that you are referring to as sun dried. That is a conserva, that is more highly concentrated, a 15 to 1 concentration. That is not Salsa De Pomodoro. Salsa de Pomodoro was made in Italy with the vacuum system.

The COURT.—Q. Did you make any 16 to 1 concentration?

A. Oh, yes, about 15 to 1, 12 or 15 to 1.

WITNESS.—(Continuing.) I found out they were making Salsa de Pomodoro with vacuum pans. There was a report by Mr. Shriever of the Department of Agriculture of the United States Government that dwells on it. He made a special study of the Italian industries pertaining to the making of Salsa. I read that with considerable interest. Mr. Krenz and I got our heads together and devised the apparatus for the concentration. Krenz built it and installed it. That was in July or August 1916, that is, the installation of the plant. The contract had been entered into with Krenz

(Testimony of Victor V. Greco.)

much earlier. He had to construct these pans, build them.

I do not remember what percentage of deliveries of solid pack we made in 1916. The book I referred to before will show the actual deliveries. I do not remember whether we were able to fulfill our contracts or not. To be frank, I do not remember whether they were 50% or 100%, and I do not remember about the tomatoe sauce, whether 100% for them or not.

The reason we were slow in getting samples to Pastene was [100—71] because we wanted to be sure to get the samples out of the stuff that we intended to ship them. I think we shipped to somebody else before to them. The samples we finally sent were samples form the 665 cases that were delivered.

Mr. LANNIGAN.—Q. In your letter of October 21, 1916, Mr. Greco, you state, in effect, that you were having trouble with your vacuum apparatus and were operating it at about 25 per cent. Now before that time, did you operate this machinery at more than 25 per cent efficiency or less?

A. It was very irregular.

It would be impossible to state what percentage of efficiency, as I explained that. I cannot even approximate it, because there were no two days—it depended on the consistency of the stuff, if we were—

The COURT.—(Interrupting.) Q. Didn't you try to make it the same consistency all the time?

(Testimony of Victor V. Greco.)

A. No, your Honor, we were endeavoring at all times to perfect it to that point of heavy consistency, and naturally what would happen we did—as soon as they feared that it was going to burn in the tubes, they would run it out. Then the next batch would come along. Well, let's try again to get it to the proper consistency, and they would partly burn the tubes, then there would be a total of two or three hours cleaning those tubes, then another batch, probably they endeavored again to get it to a higher consistency and they would totally burn it, as I stated before they were five days cleaning out the tubes.

Mr. LANNIGAN.—Q. Now, Mr. Greco, what did you mean, did you mean that you were operating this apparatus on about October 21st, that very day, at 25 per cent efficiency, is that what you meant?

A. Well, what I mean I imagine was operate it as a whole, considering [101—72] the time that we had lost with the apparatus, at that time it would be about 25 per cent.

Q. Now, I will ask you, Mr. Greco, what you meant by the words “we are now operating this apparatus at about 25% capacity”?

A. Just exactly what I wrote.

Q. You meant that on that day you were operating? A. No, not on that day, about that time.

Q. That you were getting 25%.

A. I might have just the day I wrote that letter, we might have been running 10% or 40%. We kept no record exactly of the percentage that we

(Testimony of Victor V. Greco.)

were getting. We got this percentage, judging from finished product, I knew that I was to turn out so much and I was not doing it.

Q. Judging by the finished product at the date prior to October 21st how much efficiency were you getting out of it approximately, were you getting 25 per cent or 50 or 75?

A. I don't know. I haven't any idea.

The COURT.—Q. About what time did you make this shipment to the New York house of 500 cases on 1000.

Mr. McNAB.—I can get you the date, your Honor.

A. That was 500 cases on 3,000, your Honor.

Mr. McNAB.—October 30th they were shipped, the order for the shipment.

A. No, Mr. McNab, you looked up Pastene's.

The COURT.—Q. I say, what time was it that you sent this shipment of 500 cases to the New York house?

Mr. McNAB.—Oh, yes, I did not have that.

A. That is in the book, McNiece.

The COURT.—Q. You stated this morning that that was one instance where you had delivered 50 per cent.

A. No, your Honor, that was a New Orleans instance, where there [102—73] was 200 on the contract and 100 cases shipped, the 500 cases to New York as against a contract of 3000.

The COURT.—Yes, I guess I was mistaken about that. (Tr., pp. 99 and 100.)

(Testimony of Victor V. Greco.)

Q. Now, if along about October 21st you were getting approximately about 25 per cent, was the machinery in the vacuum apparatus working better or worse than it had been.

A. The same way.

Q. You mean to say that you got about 25 per cent right through the whole season on an average?

A. No, on an average less than 25, on an average of the whole season I only got 19.2%. As to the efficiency of the machines, that is my efficiency; 19.2% was all I was able to produce. That is all I got out of that machinery, due to defects in the machinery and to inability of securing sufficient raw material. I figured the capacity of the machinery at the beginning of the season to be about 30,000 cases for the season of 200 tins each. We contracted to sell 18,930 cases.

Q. 18,930 cases was the total? A. Yes, sir.

Q. How many tons of tomatoes would it have taken to produce 18,900 odd cases?

Mr. McNAB.—Q. You mean all of one product, solid pack?

Mr. LANAGAN.—No, we are talking about the Salsa di Pomodoro, of course.

Mr. McNAB.—You are figuring only on Salsa di Pomodoro?

Mr. LANAGAN.—That is all.

A. It would have taken about 2800 tons if I have not made any mistake in my computation, about 2800 tons. [103—73A]

Q. You don't know how many cases of solid

(Testimony of Victor V. Greco.)

packs or standards that you sold in 1916?

A. I don't know it now, no, I don't recall that, I didn't prepare that information.

Q. You are going to find that out from your records? A. Yes, sir.

Q. And be prepared to testify on that point. Your Honor, if I may reserve the right to go further into this vital matter of a short pack, that is to say, tonnage and acreage.

The COURT.—You will have an opportunity to continue with your cross-examination when he has informed himself of these things that he cannot testify to now.

Mr. LANAGAN.—Yes, with that understanding, that is all for the present.

Mr. McNAB.—There will be not the slightest objection on our part to that. (Tr., pp. 100 and 101.)

Redirect Examination.

When I said that the product known as Salsa De Pomodoro could [104—73B] be made on a kitchen stove, I meant in an experimental fashion and not as a practical commercial proposition.

The COURT.—Q. Well, lots of Italians in Italy do make it right on their own stoves for their own use and for sale among their neighbors, isn't that a fact, this same sort of sauce. I don't know whether they call it Salsa De Pomodoro or whatever you call it?

A. No, what you are referring to is the Conserva that they make to distribute among their neighbors because they cannot make the Salsa de Pomodoro

(Testimony of Victor V. Greco.)

in their kitchen stoves and preserve it because they have got to have canning machinery, if it is not hermetically sealed it will not keep, but this other product, the Conserva, does keep, that is so dry, has so much solid to it that it does not require any hermetically sealed package.

Q. It is preserved by the salt?

A. By the salt and its high concentration.

WITNESS.—(Continuing.) I can give you an approximate figure within my best recollection, an estimate of the acreage which I had under contract in the way of raw product in 1916 in advance of looking up contracts. I think I could recall the various firms. The contract for delivery to McNiece or the two contracts with McNiece which have been introduced in evidence by the plaintiff, the percentage of those contracts I was able to supply was 16.7. I was under contract to supply 3000 cases, including the Cornell contract that Mr. Lannigan refers to. That is 3,000 cases, exactly the same amount as the order of the plaintiff in this case, and to that party I delivered 16.7 per cent.

Q. Could you have produced a more liquid product from this machinery?

The COURT.—He has gone into that several times that they could and would not have had the trouble and all that. He said [105—74] concentration is what produced the trouble.

Mr. McNAB.—Q. When you were discussing this matter with Mr. Pastene, and prior to the entry into the contract, what conversation occurred be-

(Testimony of Victor V. Greco.)

tween you, relative to machinery and methods of manufacture, if any?

A. Mr. Pastene seemed to have been very favorably inclined and seemed to know something about the machinery itself, that the vacuum equipment produced a better quality of material, stating that his best deliveries from Europe, the brands that were best came from Naples, and from Palma, two districts where they had modernized their plants and put in the vacuum equipment, while the product which came from Sicily which was concentrated in a large open kettle did not produce as good a quality of material, and he was very much satisfied to see—to learn rather that I was aiming to put in that class of equipment.

WITNESS.—(Continuing.) There was nothing said between us respecting the installation of any particular form of machinery, or whether such machinery was to be had in the United States. There was no manufacturer in the United States who was producing any commercial quantity of Salsa De Pomodoro. There was a reference made between us to the fact that I was pioneering in this business.

When I tried to get tomatoes elsewhere, as I have testified, I sent to Manteca. It was not a very large tomato producing community at that time. They began to develop those farms there and producing tomatoes more so since. It was in its infancy at the time. I made numerous efforts continuously in the Santa Clara Valley to get

(Testimony of Victor V. Greco.)

tomatoes. I made inquiries from place to place.

Q. Do you know of any places at all in the State of California where you could have obtained any tomatoes suitable for your purposes?

A. They were not obtainable. [106—75]

WITNESS.—(Continuing.) When I alluded in my letter of October 21st to a 25 per cent capacity, it was an approximation based on the time that had elapsed and the product that we had already succeeded in producing as our records of shipment.

Testimony of Milton M. Berne, for Defendant.

MILTON M. BERNE was thereupon called as a witness on behalf of defendant and testified as follows:

I live in San Francisco. My business is canned goods and dried fruits broker. Prior to engaging in the brokerage business I was in the wholesale grocery business. I have been in both those businesses 21 years. During that period of time have been engaged in the business of dealing in tomato products. Corresponded with associated brokers throughout the United States in order to learn conditions in other tomato producing sections. I know of my own knowledge that the packing and canning trade has applied a definite and distinct meaning to the phrase "short pack." Short packs may develop from any one of a number of causes; a short pack may be occasioned by crops failure or poor crop; it is also oftentimes occasioned in the case of an individual canner by that individual

(Testimony of Milton M. Berne.)

canner's misfortune, as for instance some mishap in his plant; let us say that he might blow out a cylinder head in the apparatus and during the height of the packing season would have to shut down his plant for a period of two or three weeks. That would result in his individual plant having a short pack whereas other packers might have made a full pack. When the canners league drew the contract covering the list of California canned goods those things were considered and the contract is supposed to take care of short pack under that definition. The term "short pack" is not synonymous with "short crop," but it is more extensive. [107—76]

Q. Is the term short pack applied only to a locality or is it applied to the individual packers? What I mean by that is this, suppose there should be a large crop in any given section in which the canners are located but through individual misfortune one of the packers is unable to fulfill all of his contracts without negligence on his part. What is the rule with regard to the construction of the term short pack?

A. As accepted by the trade it would not be considered short pack, if there was a large crop, and all the canners made full delivery, or nearly full delivery, it would be considered that there was a full pack or a good pack, not a short pack.

Q. But if the individual packer through misfortune in his cannery, break down of machinery, inability of the machinery to work right, should

(Testimony of Milton M. Berne.)

be unable without wilful misconduct on his part to fill his contract, and would be required to prorate, is that or is that not considered justifiable short pack?

A. Yes, for his individual case it is considered short pack, and we have always presumed that the Cannery League contract has protected such canners in such contingency. The trade recognizes the right of the individual packer who through misfortune in his plant or otherwise has been unable to produce the full pack, to prorate under those conditions. A canner may sell, for example, to half a dozen buyers a thousand cases say, or say 6,000 cases; he may only pack 4000 cases, and you get your result for delivery to each individual buyer by dividing 4000 cases by six. I know about the packing conditions in the Santa Clara Valley in the year 1916. Those conditions were poor, owing to late frost, and I think it was Sunday, May 7th, one of the latest frosts we ever knew in California, damaged the young growing tomato plants which had to be replaced by other plants from the hot beds; there were insufficient [108—77] young plants in the hot beds to replace the acreage, which curtailed the tomato crop in the valley that year; that however, would have been a minor misfortune had not the general growing conditions throughout the remainder of the season from May on been unfavorable for growing tomatoes; the conditions throughout all of the producing sections of the United States in 1916 were poor, and the eastern

(Testimony of Milton M. Berne.)

states drew very heavily on California for their supply of canned tomatoes. Excluding the Santa Clara Valley the crop conditions in 1916 for the tomato crop of California were poor. There was a general short pack of the crop of 1916 not only in the Santa Clara Valley but in California, due to poor growing conditions, bad weather and such. The frost I have been speaking of occurring in May was a frost affecting the young plants which required replanting, thereby getting a later start, but they subsequently put in new plants which made the crop, much of the crop, late that year; you see the plants which survived the frost came along and produced tomatoes at a normal time, which we will say the middle of July for canning purposes, but the plants which were killed were consequently that much later and their yield was reduced. That is, they did not mature. I am slightly familiar with the product known as Salsa De Pomodoro. It is practically a new domestic product, in the United States.

Q. Now, Mr. Berne, assuming that a factory has installed machinery for the purpose of producing a tomato product and either due to the defects of the machinery or failure to perfect it in accordance with subsequent developments it fails to operate, notwithstanding the utmost efforts of the packer and thereby he fails to produce the amount that he expected to fulfill his contracts with, does the canning trade, or does it not, recognize that as any cause of short pack?

(Testimony of Milton M. Berne.)

A. The trade looks upon that as a condition [109—78] over which the canner has no control and recognizes a certain right of the canner who is unfortunate to make a short delivery. That is, in making short packs, to prorate, if his contract so provides.

Cross-examination.

The contract under which the Cannery League is now operating was prepared in April, 1918; that is, it became effective, I think, then. You will find the date printed on it. I was in the tomato business in 1916 for a part of the year, up to September. We had no short deliveries made up to September in that year.

Q. Will you tell me what packer that you know of has made a short delivery on account of a break down in machinery?

The COURT.—Any instance that has fallen under your observation.

A. None that I can recall now.

Mr. LANAGAN.—Q. You can't remember anybody that ever did that? A. No.

Q. Where did you get the information that a break down of machinery would be recognized as a legitimate cause of short pack?

A. In my experience in selling the products of the various canneries there have been many causes for their prorating deliveries, prorating sales; there are a multitude of excuses that are offered by canners.

Q. I am not asking about the excuses they offer

(Testimony of Milton M. Berne.)

because that will cover the whole business of the world, and you know it.

The COURT.—Just what will be considered as legitimate [110—79] for bringing into the trade the term “short pack.”

Mr. McNAB.—In other words, what excuses are accepted by the trade.

Mr. LANAGAN.—That isn't the question I asked at all. A. Will you repeat the question.

Q. Repeat the question, Mr. Reporter.

(Last question repeated by the reporter.)

A. Nobody gave me the information; that is my opinion. (Tr., p. 110.)

Redirect Examination.

The question of breakdowns of machinery has never to my knowledge arisen before in the fulfillment of any contract. A short crop, short deliveries by growers, any cause beyond the control of the individual canner, strikes, fires, are causes of short delivery.

Q. I suppose that is during the season, that in the critical point in the season, if the plant were to be burned, or seriously injured by fire so as to make it impossible to carry on operations that would be regarded as one?

A. Yes, that would be a cause for either prorate delivery or none at all.

WITNESS.—(Continuing.) Prior to the adoption of the standard [111—79A] packers' or canners' league contract, the substance of its statements were accepted by the trade as governing their

(Testimony of Milton M. Berne.)

actions. Prior to the adoption of the contract, effective April 1, 1918, we had another Cannery's League canned fruit contract which is also adopted by the Cannery's League, but this contract of April 1 is a reconstruction of the old contract. This is the latest. But regardless of the contract which they may have developed through this process into the present contract, my statement of what is understood by the trade as short pack applies over those years regardless of any contract. I have been 21 years intimately connected with the business.

Mr. McNAB.—Q. Now, I will ask you the question as an expert in the matter, assuming that a contract had been entered into by one of the parties to this action for the production of a product known as Salsa De Pomodoro which was a domestic product, was a product which had not theretofore been manufactured in America, and the party agreeing to deliver the goods for the first time installed machinery for its manufacture which had theretofore never been used for that purpose, and with competent and skilful and capable engineers operated it as skilfully as you could during the period of the season and was unable on account of the choking up to produce the required amount for his delivery, would that be accepted by the trade as a justifiable reason for prorated delivery of the short pack?

Mr. LANNIGAN.—I object to that question in that the hypothetical question does not agree with the facts in this case. (Stating reasons.)

(Testimony of Milton M. Berne.)

The COURT.—The trouble with the question is that it does not call for expert knowledge at all; it is not a subject matter according to the witness' own statement that has ever fallen within his [112—80] observation.

Mr. McNAB.—Does your Honor sustain the objection to it?

The COURT.—Yes.

Mr. McNAB.—I save an exception.

Which exception the defendant hereby specifies as
DEFENDANT'S EXCEPTION No. 2.

A second question having been propounded to the witness respecting breakdown of machinery, the Court said:

The COURT.—Q. Have you any instance in your mind of that kind, has it every occurred, to your knowledge? A. No specific instance.

Q. You know of no instance?

A. Not that I can recall now.

I know of no instance where the trade has been called upon to put its construction upon the effect of such a cause.

WITNESS.—(Continuing.) I do not know whether or not regardless of whether it has been called upon to rule upon a specific instance the general condition which I have been describing, the breakdown of machinery, troubles with machinery and the like, has been discussed by the trade.

Q. In the year 1916 were the conditions in the Santa Clara Valley more severe climatically than they were in other parts of California?

(Testimony of Milton M. Berne.)

A. No. It was general. 1917 was a better year; 1918 was a better year. We have had two poor years, 1913 and 1916. Outside of that we have had, as far as tomato crops are concerned, normal crop. The crop in 1916 was very much poorer than the crop of 1919.

Recross-examination.

Mr. LANAGAN.—Q. What was the average tonnage of tomatoes produced per acre in the Santa Clara Valley in 1916? [113—81]

Mr. McNAB.—Do you want to test the witness or is this for the purpose of information?

Mr. LANAGAN.—Both.

Mr. McNAB.—If you want the information, we accept whatever *you there*.

Mr. LANAGAN.—Q. Do you know?

A. I don't know.

Q. Do you know what it was in 1917? Was it more or less in 1917 than in 1916, Mr. Berne? (Tr., p. 116.)

I am more familiar with the selling of the finished product than I am with the growing and the manufacture of the product, although I do keep in touch with both those ends of the industry merely as a matter of information for the purpose of helping sell the finished product. I cannot tell you what was the average production of tomatoes per acre over a period of about 5 years from 1913 to 1918, inclusive. I of course know about what it is, but I am not competent to deal with that end of the business, the production end. I do not know that

(Testimony of Milton M. Berne.)

the average production in the Santa Clara Valley in 1916 was 9.09. That would be a fair average production. Outside of the Santa Clara Valley they grow tomatoes in Alameda, San Joaquin and Sacramento Counties, and many of the southern counties around Los Angeles, also Sonoma County around Santa Rosa.

I said 1913 and 1916 were the bad years, if my memory serves me right. I am not exactly certain of it, because I came here unprepared to testify. I know that the average production in Santa Clara County was low in 1913. It was better in 1916 than in 1913. It was better in 1917 than in 1916. I am not familiar with the statistics which you are asking me about.

Q. Is it not a fact that you do not know whether it was better in 1917 than in 1916?

A. May I answer in my own way? [114—81A]

Q. I want you to answer my question: Is it not a fact that you do not know whether it was better in 1917 than in 1916; isn't that true?

A. Yes, it is true.

I am basing my statements as to the results of the crops of 1913 and 1916 upon my dealings with the packs, not with the growing conditions—with the selling of the pack. Regardless of whether the average production per acre is correct or not, in view of the climatic conditions, the acreage is very often reduced.

By consent of counsel for the defendant the plain-

(Testimony of H. T. Rigg.)

tiff at this [115—82] point called in rebuttal and out of order—

H. T. RIGG, who testified as follows:

Testimony of H. T. Rigg, for Plaintiff (In Rebuttal).

In the year 1916 I was in the employ of the Greco Canning Company. I have heard the testimony given in this case. I ran the machinery they have been talking about, commenced to run it about the middle of October. A man named George Taylor was running it before I got there. He was a man that came up from the Krenz Copper Works. He showed me partly how to run the machinery. From that time I was in charge of running this machinery. Had very little trouble at first. We were running day and night. We ran about a week or ten days. After that we ran day shifts on to the end of the season. From about a week or ten days after the time I took charge on to the end of the season, we worked only in the evenings, extra overtime. Did not run all night. I kept a slight record of the time. I have it with me, daily report. The day I commenced I haven't got down here. The day I commenced keeping this diary Mr. Krenz asked me to make a report for his benefit, so that he could get the capacity of these pans, the vacuum system. The first date is October 10th when I began this report. That day I was delayed two hours and ten minutes on account of the filler or the pulper. It choked up. The pulper is the thing that skins and seeds the tomatoes. Also No. 2 pan stopped. That is one of

(Testimony of H. T. Rigg.)

the vacuum pans. We stopped one at a time for cleaning out. The tomatoes were plugged up in the tubes. We finished work with this paste machinery for the season November 28th.

The COURT.—Q. Can you tell from your books the time that you really did run it day and night?

A. Not exactly, for the simple reason that it was two or three [116—83] days after I started the day shift when Mr. Krenz came up and asked to keep this report. I do not exactly know whether it is 2 or 3 or 4 days. I went there and commenced running about the middle of the month. I started a little earlier than the 10th, in the early part of the month. Finished November 28th.

During the time we were running the paste line I had a conversation with Mr. Greco. I told him that we were not going to get out what we had contracted to do. We were not going to be able to fill our contracts, and he said, maybe not, but he said if we can get 20 per cent, we will be all right anyhow. Further than that I had no more conversation about that.

There was no time that we did not stop altogether. There were times when we ran along short on account of green tomatoes coming in and we could not use them for making sauce. I think that occurred twice. That was right after the rain began. The rains began the 2d of November. There was rain the latter part of the month of October once in a while. There would be a little shower, but it did

(Testimony of H. T. Rigg.)

not amount to much. The serious rains commenced the 2d of November. There did not any green tomatoes come in but stopped us from packing for about 3 days because we could not get into the fields to haul them out. On November 18th we did not run very much through the vacuum pans on account of green tomatoes. I see no instance before that. That is all I see here.

I worked a year before that for Mr. Greco at the same place. From what I could see we had a fair crop. I do not think I heard any talk or discussion there about the pack being short. They had plenty of tomatoes until the rain came and that kind of shortened them for a few days. That was in November. I do not remember of any rains in October; probably a little sprinkling, but it did not hurt anything. There was no frost that I remember of [117—84] until the latter part of November. I was not there in May. I was in town but I was not working at the cannery, but I did not pay any attention to whether there was a late frost or early frost that spring. The cannery is right in San Jose.

Cross-examination.

I began keeping this report October 10th. I do not know exactly the date I went to work. Kept the record at the request of Mr. Krenz. Sometime early in October I went to work. I do not know where the man went who had been operating the machine before me, but he quit and went to work

(Testimony of H. T. Rigg.)

somewhere else, I suppose. I do not know of my own knowledge.

I have a record of the number of times we had to stop on account of the machine choking up and the like. I have not called attention to that because I was not asked.

Mr. LANNIGAN.—We might save time. It is not our contention at all that this machinery worked. We admit it did not work, that they had an awful lot of trouble with it. We are not trying to show that the paste line actually did work.

The COURT.—That is true enough but they have their theory of the case and until it is determined it is an erroneous theory they are entitled to present their case along those lines.

Mr. LANNIGAN.—I did not mean to object; I merely wanted to say we might save time, and admit the machinery did not work.

The WITNESS.—(Continuing.) October 10 we were delayed 2 hours and 10 minutes on account of the pulper, that is, the machinery on the lower floor. Then we were delayed 2 hours cleaning the pans, No. 2 vacuum that same day. The delay of the pulper necessarily stopped the vacuum. There is a continuous feed from the pulper to the vacuum. There was a total stoppage on that day [118—85] of four hours and ten minutes. The interruptions in the two different parts of the machinery occurred at different times so that made it four hours and ten minutes. The next record shows that we that day stopped ten minutes for the cooker. That is on the

(Testimony of H. T. Rigg.)

other end of the machinery. And on the 11th we started at 6 A. M. in the morning and stopped at 9:20 in the evening and stopped two hours for the pulper again. Stopped another hour and 30 minutes for lunch. Then we stopped two hours again to clean No. 2 vacuum pan. This was on the 11th. On the 12th No. 1 pan stopped 23 hours for cleaning. This 23 hours carried us into the night. We worked during the night cleaning the pans. Mr. Greco was there off and on around where I was working. I cleaned it out by using an electric drill. The product had so caked and burned inside of the tubes that it had to be drilled out by an electric drill and it took 23 hours to do it. On the 13th we stopped one hour on the filler. Anytime anything occurred in any of the machinery it stopped the vacuum pans, just on either side of them, where the fruit came to the vacuum pan and where the vacuum pans had discharged. On the 14th started cooking at 6 A. M. and stopped 5 hours and 30 minutes for the sealer. That has something to do with the vacuum plant. It is not attached to it.

The court and witness here indulged in a colloquy relative to the machinery, and the witness proceeded as follows:

All of those machines that I have mentioned are connected with the pans, because on the other side we could not get the material for the pans if that machinery did not work, and on the other side could not take it away. The vacuum pan stops the whole of the machinery.

(Testimony of H. T. Rigg.)

Q. Was it a part of the installation that was devoted exclusively to the production of this stuff?

A. Yes. [119—86]

Q. That is what I am talking to you about. I am not confining it to the vacuum pans, but I say the installation that was devoted and put in there for producing this product that you are talking about.

A. These machines are all put in for that purpose.

Q. I am asking you, Mr. Witness, to give us those interruptions.

Mr. McNAB.—You were down to October 14th. Commence from there on. There was 5 hours and 20 minutes on October 14th, what was next?

WITNESS.—(Continuing.) On the 15th we stopped an hour and 10 minutes for the sealer. On the 18th we ran straight through 10 hours. We were not running night and day then. On the 19th we stopped 2 hours for the cooker. On the 20th we stopped an hour for the sealer; that is the canning machine. On the 21st we stopped 1 hour and 45 minutes for the same reason. This sealer was installed as a part of the same plant. It was built for the purpose of sealing the Salsa De Pomodoro cans. It was built on the same principle, but only for that one-sized can. It was not a machine such as have been used for years in the canning industry. The machine was built especially for that purpose, but the principle of the machine was something that was known and used in the canning industry for a long time.

(Testimony of H. T. Rigg.)

On the 22d we stopped 7 hours for the cooker, just an ordinary cooking machine. It was a large metal box and it has a cylinder inside where the cans fell through continuously cooking as they revolve. It was cooked again after the can was sealed. That is a usual and ordinary appliance in a canning plant, but this was a particular cooker devoted to this product, to the production of it. On the 23d we stopped three hours for the cooker. On the 24th we were held back on account of the [120—87] cooker, just stopped a few minutes and started again. On the 26th we were held back two hours by the crew that ran the steamer. On the 30th we stopped two hours for the cooker and seamer. On the 31st we ran slow on account of green fruit. We kept running, but ran slow, sorting tomatoes, and it took time. We could not run up to capacity. They did not have the proper fruit. On November 1, 1 hour and 40 minutes stopped for the pulper. The pulper is a machine used right along, the regular standard machine. This was built a little larger than ordinary. Works on the same principle, which was for the purpose of making Salsa De Pomodoro and was specially built larger than the ordinary pulper. From the 3d to the 5th we did not run any. That was during the time of the rain. On the 13th we were held back on account of the tomatoes being green. The 14th we ran along slow on account of the seamer again. On the 15th we ran slow on account of the seamer. On the 16th we stopped 5 hours and 30 minutes for the cooler.

(Testimony of H. T. Rigg.)

That is all the stops we had until the 28th, when we stopped for the season.

The only part of this machinery that was not standard and that everybody knew about was this vacuum pan business. The pan itself was 36 inches in diameter inside measurements, and they stand about 8 feet inside. There are 204 tubes in each pan, and two pans, making 408 tubes. Sometimes some would choke and some would not. We did not remove the tubes to drill them, but installed a drill inside of the tube and went through the pulp or whatever it was. The commodity inside was hard up and down through the tube. My business did not call for me to pay any special or particular attention to frosts or rains. I do not know anything about the trouble they had with the vacuum plant prior to my arrival there, nor how much time, if any, they put [121—88] in drilling out the tubes or the like. I had never had any experience with tomato machinery, that is, the vacuum system on canning fruits. So far as its application to fruit was concerned, that was the first time I had ever known it to be applied in that way. So far as I know, it was an absolutely new machine, this vacuum or tube system. I had been working a little over a year in packing plants.

During the time that we were running this vacuum plant the rest of the plant that ran during the day and some overtime in the evening, though they never ran all night on the other part, but the vacuum plant we ran that night and day about the

(Testimony of H. T. Rigg.)

first week I was there; after that we did not. I do not know how long it had been running night and day before my arrival. In canning ripe fruit like tomatoes you frequently have to run a plant overtime in order to save the fruit from spoiling. We would run through, sometimes run up until the middle of the night, and sometimes simply a couple of hours. They sent out into the fields for the fruit. There were some few of the growers delivering them; I don't know how many. The growers delivered the fruit, from what I understood; I don't know positively; that is, the growers pick their own crop and delivered it at the cannery. Once in a while there would be a little green fruit. We would have to stop sometimes, because we did not have ripe fruit to proceed with. That happens in all canneries.

Mr. Greco himself was at the cannery nearly all the time. I don't know of anything that he could have done to keep this new vacuum plant going at full speed all the time that I was there. I did everything I could to make it run. I don't know what his reason was for running all night unless it was to get out his orders. As I said, when I was talking to him I said he would [122—89] not get out the orders that he wanted, and he said if you get out 20 per cent it would save him all right. That was along the latter part of the season, along about November some time. I could not say whether it was the latter part. There was nothing that I could do to make the vacuum plant work faster, because

(Testimony of H. T. Rigg.)

I was not down on the other machinery. I had nothing to do with that part of it. When I had to drill out with the electric drill, sometimes it choked up in the same tubes and sometimes others. I had nothing to do with the cooker or seamer, or anything but the vacuum plant. Mr. Krenz stated that he wanted a record kept of its operations. He said he wanted to see whether the plant would turn out what he figured it would amount to. He did not say what he figured. He said he had estimated that if run under good conditions and working perfectly it would turn out 50,000 cans a day, that is, six ounce cans. There are 200 of these six ounce cans in a case, and that is what he figured ought to be its capacity. He was there several times and assisted in cleaning out the tubes. He was there the early part of my employment. He told me that it was new and experimental machine and he wanted me to keep data to see what information he could get as to its operation. I do not know the name of the other man, but he was working on the night shift. During the time that he was there, he was only there about a week or ten days after I commenced, and Mr. Greco took him off and I ran during the daytime. Nobody was running it at night.

**Testimony of H. T. Rigg, for Plaintiff
(Recalled in Rebuttal).**

Thereupon H. T. RIGG was recalled by the plaintiff and testified further as follows:

Very frequently during the season of 1916, when I was in the [123—90] employ of the Greco Can-

(Testimony of H. T. Rigg.)

ning Company I had an opportunity of observing the tomatoes that I was putting through this paste machine. There was no time that I can recall when there was a shortage of tomatoes, outside the latter part of the season, in November, those three days that I testified to, and the latter part of the season. We were slowed up at least on two days on account of green tomatoes coming in, and that was due to the fact that it took a long time to sort them, because there were so many green ones. With the exception of that we had plenty of tomatoes. That was not until after the rains. The best day's pack that I had with this machinery was 29,070 cans. I do not think that represented the capacity of the machinery. That was the best we got. That would be around 140 cases. The part of the cannery working on standard and solid pack and so on were running right along. They aimed to run the regular time, about 10 hours. Quite frequently they ran overtime a couple of hours in the evening. They worked right along.

Cross-examination.

In the other part of the plant they could use a different quality of tomatoes. They could use tomatoes a little greener than they could in the vacuum, and for the making of Salsa De Pomodoro it should be a perfectly ripe tomato. They are sorted stock, sorted tomatoes. Those that were of the commoner or inferior quality would be sent over to the other side and put into the general

(Testimony of H. T. Rigg.)

product. During November we did not shut down because we did not have the tomatoes. We shut down the night shift because the night man could not seem to make a success of running it. 29,070 cans was not up to the machine's capacity. The next year we ran the same kind of a pan and I turned an average of 37,000 [124—91] cans a day, with the same kind of machine. Krenz said that if the machine run perfectly and everything connected with it ran perfectly that he could run out 50,000 cans a day. 37,000 cans was my average run, but I never did that in 1916. I don't know as Krenz guaranteed that. Krenz had told him that if it were run properly it ought to produce 50,000 cans. I ran the machine to the best of my ability according to the practice that I had had with the other machinery. I learned about the handling of the machinery in 1917, but the second year I did not work with the same machine. It was the same kind of a machine built under the same patterns. There were no changes in it. The tubes were no larger than the one I was running. They were inch tubes. It was not built in another factory, but by the same manufacturer, of the same size, but I never did get up to 50,000 cans a day. I do not know anything about the condition of the tomatoes out in the fields which were under contract by the growers to Mr. Greco. I was never out in the field. The latter part of November the tomatoes were destroyed by the frost. That is what stopped us

(Testimony of H. T. Rigg.)

running. That is what usually stops the run. We run right up to the frost. I should judge 1916 was an average season in November.

Testimony of Leal Davis, for Defendant.

Thereupon LEAL DAVIS, being called as a witness, testified:

I am superintendent of the Crow Canning Company. Prior to joining that firm I was an engineer, more particularly with refrigerators, although a general mechanical engineer. In 1916 I was consulting engineer of the Greco Canning Company, also chief engineer of the National Ice Company's San Jose plant. In that [125—92] capacity I had something to do with this plant which was installed for the purpose of making Salsa De Pomodoro. My first connection with Mr. Greco was early in the spring of 1916. With respect to the installation of this particular plant, of course, during the early part, we prepared the buildings and the general plan of this plant. That work was being done I imagine along in January and February, and then the machine did not actually arrive there until some time in June or the fore part of July. The manufacturer of the machine directed the installation. He had his own men there. I became familiar with the machinery during its installation, and had an opportunity to observe its operation. Indeed, there were very many delays or trouble in its operation in producing this commodity. Stating what came under my observation: In starting the apparatus up,

(Testimony of Leal Davis.)

I believe after about the second day it was run, we had trouble with the tubes, with the stuff burning in the tubes; it was evident from the start that the tubes were too small to take care of such a heavy product, and it would burn and cook in the tubes which necessitated long shut-down for cleaning; sometimes it cooked as hard almost as like iron, and had to be drilled out, the same as you would drill iron, only it was more difficult to drill because it would stick and cling and clog on the drill bit, which made it a very slow operation; that trouble existed for a time until the following year when those pans were returned to Mr. Krenz and larger tubes were installed in the pans. Since then we have had much less trouble. To my knowledge no machine or equipment of that kind had ever been put to the purpose of manufacturing this product before. This was an experimental work really, both on our part and on the part of Mr. Krenz. The interruptions during the course of the season's work were almost of daily occurrence. I [126—93] doubt if there was a full day's operation during the season that we ran full time without trouble. The time required to accomplish the operation of drilling out the tubes when choked varied depending upon the extent that they were burned. In some instances there would be only two or three tubes *clog* and sometimes practically every tube was clogged. There was one time that I remember we were down about five days and nights cleaning and practically every tube in the pans was clogged. There were 200 and

(Testimony of Leal Davis.)

odd tubes. I do not remember the exact number, in each pan, and there were two pans. There was one occasion when all of them were clogged at the same time. It took five days and nights working continuously, working all night. During that entire five days and nights we did not use the machines for any purpose—could not use the machines for any purpose other than cleaning out.

This is the first installation of that kind of machinery in this country, I believe. I have had experience with machinery since, and I am in the employ of the defendant. The present machinery used is an improvement in the respect that the tubes are larger, but otherwise the general plan is the same. I have had four years' experience with the machinery including 1916, and that has been under my supervision, and I have learned the manner of handling and operating it. With my four years' experience with this machinery I testify that there was nothing that could have been done, not at that immediate time, to have made the machine operate more efficiently than it did in 1916. The remedy which was finally proven and has been done was to have larger tubes installed in those pans, and that is a very long job, which had we undertaken to have done it, before the work could have been completed, the tomatoes would have been all gone. Of course, it [127—94] was not until it was pretty well along in the season that we were firmly convinced that larger tubes was the remedy.

As to capacity: With the smaller tubes, of course,

(Testimony of Leal Davis.)

you have got a greater heater surface, and if the tubes would keep clear you would have a larger capacity with smaller tubes than you would with larger tubes on account of having more heating surface there; but, as a matter of fact, the small tubes did not keep clear, which made continuous running impossible. So I would say the overall capacity was increased, whereas the capacity for a short period while the tubes were cleaned would be decreased. Since the machine was changed the largest day's run we have made was 128,000 cans with four pans; that would figure out about 30,000 with one pan. It is far below what the guaranteed capacity was supposed to have been originally. On account of my experience with this type of machinery I am now consulted widely with respect to the operation of this kind of machinery. I believe I am more or less regarded as an authority now with regard to this type of machinery, and I am stating what I have stated with respect to its output in 1916 in view of my experience. I know that the cannery shut down early in the fall of 1916, that is, earlier than it has since I have been connected with it, on account of early frost. I do not remember the exact date. The subject of frost is, of course, something with which I have nothing to do.

Cross-examination.

I am familiar with the reasons why this machinery failed to work. There were some difficulties with the pulper and seamer, and there always has been ever since. As a matter of fact, I believe that

(Testimony of Leal Davis.)

it is quite customary in most canneries that these machines always give more or less trouble. They are the kind [128—95] of machines that are used in practically every cannery, that is, the cooker, pulper and seamer. Practically the only thing new about this paste line installed in 1916 was the vacuum pan part of it. Of course, the other machines were built ordinarily to handle these small cans. These small cans are more difficult to handle than the ordinary sized cans, that is, the 6 ounce cans in which the Salsa De Pomodoro was packed. It is no harder to cook a six ounce tin, but it is harder to get in and out of the cooker on account of the fact that the can does not roll as readily as the larger diameter can. The pulping machine was practically, I believe, an ordinary pulping machine. The delay on account of the pulper, cooker and seamer generally, but not always meant delay in the whole apparatus. Sometimes the delay in the pulper might not shut down the vacuum pans, because you might have enough pulped ahead to have a surplus to run on for a while, which is generally done.

I did not so much supervise the running of this machine as the installation of it, but I supervised the running of the vacuum pan. I was there every day. The man who built the machine directly supervised or installed it, but I had supervision over the whole plant in a general way. I know Mr. Rigg who testified. He was actually running the thing for a while; I don't know how long. He came

(Testimony of Leal Davis.)

there when the season was fairly well advanced; in fact, we got through with most of our serious troubles before he came. I could not recall the exact time he came. I believed he stayed to the end of the season. He ran the vacuum and was on the job every day. I think they started the plant some time early in September. He came there the 2d or 3d of October. We had our greatest trouble on the start in this way: We wanted to make a very heavy product and the product that we made at first—Mr. [129—96] Greco was very anxious to have it still thicker. In making it still thicker we had more trouble with burning. Then after a time everybody decided that it would be better to make a little thinner product and sacrifice quality a little bit and have more capacity, so that we would not be shut down for so much cleaning. I was there every day and saw this part of the plant in operation. I do not think I ever say the paste line shut down for lack of tomatoes.

Thereupon the following proceedings took place:

Counsel for plaintiff offered in evidence a tabulation showing acres, tons and tons per acre of tomatoes from 1916 to 1918, inclusive, stating that the tabulation had been prepared from the books of the California Packing Corporation and the California Fruit Cannery Association, and that it showed the tonnages not only of Santa Clara County, but Alameda County, Los Angeles County and Santa Rosa, meaning Sonoma County.

Mr. McNAB.—I desire to offer an objection at

(Testimony of Leal Davis.)

this time, not to the competency of the proof, because I do not want Mr. Lannigan to be put to the necessity of bringing in witnesses here to authenticate it, but I object to the relevancy and materiality of all these computations and particular to all evidence as to the years 1913, 1914, 1915, 1917 and 1918, as entirely irrelevant and immaterial in this case, and I object to that for the year 1916 as being irrelevant and immaterial in view of the fact that this incorporates the tonnage from distant and remote parts of the State of California, and are not relevant nor material.

The COURT.—I think that it is relevant because of the evidence that has been produced of the witnesses of the defendant tending to show the character of production for that year and for [130—97] other years, and by a comparison of some of the witnesses of the production of that year with that of other years. Let it go in.

Mr. McNAB.—We save an exception.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 3.

Plaintiff's Exhibit No. 3 is as follows:

Plaintiff's Exhibit No. 3.

Acres and actual deliveries in tons—Season 1913.

	Acres.	Tons.	Tons to Acre.	Average Delvs. During Past 5 Yrs.
C Alameda Co.	1138	6766	5.94	8.05
F San Jose	1383	8268	5.97	
C Los Angeles	946	2416	2.55	3.83
A Santa Rosa	508	1890	3.72	5.60
	<u>3975</u>	<u>19340</u>		
			S. Clara	8.66
			Sacto.	6.00
			Stockton	2.50

Acres and actual deliveries in tons—Season 1914.

C Alameda Co.	1550	16528	10½
F San Jose	860	4954	8½ on 495 acres.
C Los Angeles	863	4131	4¾
A Santa Rosa	373	2333	6¼
	<u>3646</u>	<u>27946</u>	7.7 tons to acre.

Acres and actual deliveries in tons—Season 1915.

C Alameda Co.	1562	16183	10-1/3
F San Jose	506	5437	10-3/4
C Los Angeles	670	1749	2½
A Santa Rosa	274	1526	5½
	<u>3012</u>	<u>24895</u>	8 tons to acre.

Acres and actual deliveries in tons—Season 1916.

C Alameda Co.	2186	16377	7.49
F San Jose	2127	19347	9.09
C Los Angeles	1125	5325	4.75
A Santa Rosa	272	1537	5.65
Sacramento	278	2485	8.94
	<u>5988</u>	<u>45071</u>	7.5 tons to acre.

[131—98]

Acres and actual deliveries in tons—Season 1917.

Alameda Co.	1737	13428	7.73
San Jose	3544	29314	8.27
C Los Angeles	1549	5056	3.26
P Santa Rosa	728	5032	6.91
C Sacramento	960	4817	5.00
Stockton	606	1005	1.65
Marysville	188	10	—
	<u>9312</u>	<u>58662</u>	6.3 tons to acre.

(Testimony of Leal Davis.)

		Tons		Average Delvs.
		Acres.	Tons.	During Past 5 Yrs.
Acres and actual deliveries in		tons—Season 1918.		
Alameda Co.		1175	6894	5.87
C	San Jose	1397	13284	9.51
P	Los Angeles	970	4774	4.91
C	Santa Rosa	1412	7801	5.52
Sacramento		1217	4256	3.50
Stockton		1445	3833	2.69
		<hr/>	<hr/>	<hr/>
		7616	40842	5.36 tons per acre.

At this point Mr. McNab on behalf of the defendant read in evidence from the deposition of the plaintiff P. Pastene taken in the case certain questions relating to samples of the defendant Greco Canning Company's product and the fact that no contract had been signed by the plaintiff for the sale thereof, as follows: "Q. Now, as a result of your letter to North & Dalzell, Inc., of November 18, 1916, there followed two letters to you of November 24, 1916, and December 15, 1916, Plaintiff's Exhibits 1 and 2, respectively, which have already been shown to you? A. Yes."

WITNESS.—(Continuing.) Those two letters form a part and parcel of the contract that was entered into with the Royal Packing Company. There were contracts drawn between the Royal Packing Company and my firm. I examined the triplicate contracts that you now hand me and state that those were the contracts which were submitted to me. Those contracts were never signed. The reason they were not signed was the arrangement was that they were not to be signed until we had been shown further samples sent direct from the factory. These

(Testimony of Leal Davis.)

further samples were sent to me direct from the [132—98A] factory. They were examined but they were not accepted because the quality did not correspond with the quality which had been shown us by the brokers, North & Dalzell, Inc.

“Q. Now, was the price made you by the Royal Packing Company, of Windfall, Indiana, in the November 23d contract, a fair market [133—98B] price for the goods at that time? A. For goods of the quality which they offered to furnish, it was the cheapest price that we were able to get from any source. The reason the contract did not finally go through to confirmation was that, while the quality of the tomato itself was satisfactory, and would have been acceptable, there was carelessness in the processing of the tomatoes, so that they contained slight evidences of grit or sand, showing that in the washing of the tomatoes proper care had not been used, and, as that was an objection which our trade would not countenance, or a fault that our trade would not countenance, we were obliged to refuse to confirm the contract after the receipt of several lots of samples, and after in fact carload had actually been shipped, and reached New York, and was passed upon by North & Dalzell, Inc., the representatives of the packers and ourselves.”

Mr. McNAB.—Now reading from page 12, this being introduced for the purpose of showing that the plaintiff was fully advised of the fact that machinery had to be installed, and so on. (Deposition continuing.)

(Testimony of Leal Davis.)

“Q. So that the goods which they were offering you at \$18.00 per case were of an inferior quality to those which you had purchased from the Greco Canning Company? A. For our standard.

Q. For your trade? A. Yes.

Q. I believe, Mr. Pastene, you have already so stated, but, to make sure, I would like to have you state again, what caused the scarcity of this line of goods in the American market?

A. It was an article, which, prior to the war, to my knowledge had never been manufactured in this country. As a result of the abnormal conditions the exportation from Italy was curtailed, embargoes were placed from time to time, until ultimately the [134—99] exportation was entirely prohibited. As a result of this, domestic canners of tomatoes principally interested themselves in imitating the article, or manufacturing it here from the American tomato. However, this necessitated of course, the installation of new machinery, new arrangements, so that it was not possible to produce in quantities to take care of the entire demand and consumption of the people who were accustomed to using this product.”

Testimony of William E. Greer, for Defendant.

WILLIAM E. GREER was thereupon called as a witness for defendant and testified:

I have resided in the Santa Clara Valley for six years. I was there in 1916. I am a farmer, and I was at that time raising tomatoes. I own twenty

(Testimony of William E. Greer.)

acres in that valley. In 1916 I cultivated $4\frac{1}{2}$ acres on Mr. Kell's place and $1\frac{1}{2}$ acres on my own land, —a total of about 6 acres. I was under contract to deliver those to the Greco Canning Company. I delivered a little less than 21 tons. That made about $3\frac{1}{2}$ tons per acre. That was not my entire crop by any means. My entire crop in tonnage was around 25 tons to the acre; that is what I would have had in what was spoiled and what I delivered. I had about 25 tons to the acre but delivered only about $3\frac{1}{2}$ or 4 tons to the acre. The reason for my not delivering the difference was that they spoiled; the rain came and then the frost. About May 1st we began to plant. We plant them and then along in the middle of May we had a frost. That meant that we planted most of our tomatoes over. We finally planted at that time, about the 20th of May, if I remember correctly. That gave 20 days less growing. Then we picked. We got off the first picking and started in the second picking when the frost [135—100] and rain caught us. Through the month of October we had rain. That hurt our tomatoes and they did not ripen. When they did begin to ripen frost caught them. That is the reason we did not get them off. In October I don't remember exactly how many consecutive days it rained, but if I remember right it rained about half an inch during that month. I visited the Weather Bureau in Santa Clara within the last day or two, and made an examination of their records relative to confirming my impressions. I am fa-

(Testimony of William E. Greer.)

miliar with crop conditions in the surrounding territory around my place. I visited other tomato patches, lots of them, because I wanted to see if the same conditions prevailed. I found the conditions were entirely the same as my own. They had been absolutely killed in the middle of November.

Mr. McNAB.—Q. About what percentage of the crop, if you can estimate it, was left rotting on the ground at the end of the season?

A. At least 80 per cent left on the ground.

Q. Would you, under normal weather conditions, have been able to deliver that 80 per cent to the cannery?

A. Most certainly; it would have given us 15 days more.

Q. In a memorandum which was handed me here, I think by yourself, I find reference to the weather report that on October 3, 4 and 5 it rained in the Santa Clara Valley. Do you recall anything concerning that?

A. I know it rained; I could not remember exactly the date, but I know we had rain in that month.

Q. What is the effect of a three day rain on a tomato crop?

A. At that time in the season is not much except—

The COURT.—I suppose it depends also on the character of the precipitation.

A. Yes, and the soil.

Q. And the extent of the precipitation; a rain

(Testimony of William E. Greer.)

might be a drizzle, [136—101] or it might a deluge.

A. This was a heavy rain at that time.

Mr. McNAB.—Q. The record shows 84/100 of an inch.

A. It was something out of the ordinary.

WITNESS.—(Continuing.) As to its effect on the tomato crops, it started our vines growing. It held the fruit back. It would not ripen as early. You could not get on the ground to get off the crop for at least a week. Had normal weather conditions prevailed we would have been able to deliver the 21-odd tons per acre from our patch to the cannery. I did not find any place in the Santa Clara Valley where these conditions did not exist. The crop that year was not particularly a heavy one. It was no more than an ordinary crop. Twenty-five tons to the acre is a normal crop in my vicinity. They have raised more this year and last year. The best picking season for the tomato crop in the Santa Clara Valley is in October and November, the last of October and the first of November, and during the last of October and the first of November it rained, and the situation was the same with respect to the crops around me.

Cross-examination.

In my vicinity the average production of tomatoes in the Santa Clara Valley in the year 1916 would be an average of about three or four tons per acre; that is on the south side of San Jose, that is in the heavy land, in the best tomato land. I mean by that

(Testimony of William E. Greer.)

what was delivered; that average would be about 3½ or 4 tons. I have no way of calculating exactly. You can calculate on what the other fellow hauls in. I was familiar with what the other fellows were hauling in. I was with them every day. I mean by this deliverable stuff, good tomatoes. I am still a farmer on the same place. I know how many tomatoes some of my friends [137—102] delivered to the California Packing Corporation. I can tell how many Mr. Withers delivered. He delivered about 7 tons to the acre. I do not know what was the average production in tomatoes in 1915. I was not in the game then. I was with one of my neighbors in 1915, and I am not familiar with the average production. I do not know what was the average production in 1917. I had nothing to do with the tomato game then. I was putting in a new orchard and did not bother my head about tomatoes, because I was discouraged from the year before and I said goodbye to tomatoes. I do not know in 1918. I have not had any interest in tomatoes ever since and I do not want to have. My experience is confined to the raising of tomatoes in 1916 and on Mr. Mosher's place. When you go in with a certain number of men hauling to a certain place, you know how many boxes a man brings in. You can tell how much he is bringing in along with your own. I mean the year I hauled to this particular cannery. I do not know anything about the other canneries because I had no way of knowing. We go an entirely different route. We simply get

(Testimony of William E. Greer.)

talking to a man hauling to a particular cannery and we discuss the matter. We say, how many boxes is he bringing in. 200 boxes. I know just how many that means. That means six tons. I did not sell any to anybody else.

Testimony of J. L. Mosher, for Defendant.

J. L. MOSHER, being duly sworn as a witness for the defendant, testified:

I resided in the Santa Clara Valley in 1916. I am an orchardist and farmer, owning my own property. In 1916 part of my business was raising tomatoes. I had from 20 to 23 acres. I got nearly 100 tons. I delivered about 50 tons to the cannery, a little in excess of two tons to the acre. I delivered all that [138—103] I could pick. I did not deliver all that I raised. The balance of the crop was destroyed. The rain came and the frost. Some of the tomatoes when it rained were under the vines and some lay on the ground, and if the tomato touches the ground it rots and gets soft, and they are not acceptable and they have to be thrown away. I could not tell you how many tons per acre were not taken out of the tomato patch, but it was an enormous loss. I do not believe I could tell how many. I know it was very large. I lost more than I delivered to the cannery. I delivered to the California Cannery Association, Mr. Bentley's company, which became the California Packers. I ought to have had a great deal more. I cannot tell you exactly how much more; it would be guess work;

(Testimony of J. L. Mosher.)

it was a large amount, of course. Under normal conditions a normal crop varies from year to year. I do not know that I could tell you. It ought to have been from 12 to 15 tons anyhow.

The witness here produced a memorandum showing the amount of his deliveries, and the same was received in evidence and marked Defendant's Exhibit "PP." It is as follows:

Defendant's Exhibit "PP."

"CAL. CANNERS ASSOCIATION—1916.

			Net.	
Sept.	1	35	Tons	1410
	4	46	28 boxes catsup	1902
	12	66		2687
	12	103		3766
		106		4293
	16	49		1803
	22	73		3141
	27	111		4546
	29	82		3494
				27,032
<hr/>				
Oct.	6	101		4252
	4	95		4050
	7	113	21.965	4821
	11	101		4065
	11	111		4777
				21965
				48997
<hr/>				
	12	104		4212
	17	116		4688
				14073

(Testimony of J. L. Mosher.)

18	127	5173	63070
19	117	4740	
21	115	4547	9287
[139—104]		<hr/>	
Oct. 24	118	4726	72357
	25 125	4965	
	30 137	5244	14935
		<hr/>	
	14 122	4911	87292
Nov. 13	111	3922	8833
		<hr/>	
		96125	

WITNESS.—(Continuing.) I did not have much opportunity to see the tomato patches of adjoining growers. I know that most of them were disappointed. I have not been in the tomato business since. That settled it. I had raised them on and off for a good many years.

Cross-examination.

I cannot tell the dates that it rained in 1916. I do not remember the months nor when the frost came. I know the frost came early. I know I stopped entirely that year. I think I stopped around the 13th or 14th. That was the last delivery. That was picked the day before it was delivered; the 15th of November that should be. I think we were a little short of help, a little short but not so as to be crippled at all. My tomato crop I think was not under contract. I think I delivered it without contract. I never contracted with them. I knew they would

(Testimony of J. L. Mosher.)

always give me the market price and I have always been satisfied. I sold just one load to Mr. Greco. I would have sent more if it had not rained. I was going to deliver the balance of my crop to him if it had not rained. I was not under contract to him.

Testimony of Oscar Hoffman, for Defendant.

OSCAR HOFFMAN, being called as a witness for the defendant, testified as follows:

I am a merchandise broker specializing in canned goods; [140—105] familiar with the tomato trade in 1916. I know Mr. Greco. Specializing in canned goods 22 years, and during that time believe I have had occasion to familiarize myself with the customs of the canning trade. The terms "short pack" and "prorated delivery," have a generally defined and accepted understanding in the trade. With regard to the term short pack, what is understood and accepted by the canning and packing trade as a reason for a short pack, what it means according to the common acceptance of the word, is damage to crop, frost, or any other well authenticated reason for which a packer is unable to fulfill his contract.

Mr. McNAB.—Q. Has the element of good faith on the packer anything to do with the definition of that term; by "good faith" I mean ethics on the part of the packer or the canner to deliver as much as he can?

A. That is a matter entirely between buyer and seller, the good faith of the contracting parties.

(Testimony of Oscar Hoffman.)

WITNESS.—(Continuing.) I know where the plant of the Greco Canning Company is. I have knowledge with respect to the crop of Salsa De Pomodoro, prepared by the Greco Canning Company in 1916. My knowledge arose as a broker. I sold a portion of the pack. I had sold 3,000 cases. There was a very short delivery. I have not looked up my records but believe somewhere between 15 and 20 per cent. I am speaking of the sales made in 1916 from this particular pack. It was packed by the Greco Canning Company and they sold some of it to me.

Mr. McNAB.—They sold to this witness exactly the same amount that they sold to Pastene & Company.

The COURT.—Q. Did you have a contract with them? A. Yes, sir.

Mr. McNAB.—Q. What contract was that?
[141—106]

A. That was the J. M. McNiece & Company

Q. You contracted for 3,000 cases?

A. Yes, sir.

Q. And there were delivered 16.7 per cent?

A. Yes, sir.

WITNESS.—(Continuing.) I visited the canning plant of the Greco Canning Company while they were engaged in the manufacture of this product. I saw the conditions confronting the defendant. To the best of my recollection I called there at one time, and I was very much interested in watching the process. I found that they had stopped work

(Testimony of Oscar Hoffman.)

because the pipes leading up to the vacuum tank were clogged and it was impossible to continue. This mass of tomatoes had apparently solidified in these pipes or caked until they had to use drills to clear out each pipe. Later on when they had managed to get back into working order again, I found that they had to work very much slower because of the lower degree of either heat or vacuum. I do not know the identical process, but on account of the discharge of these pipes becoming again clogged, they had to work very, very much slower. I do not know about the Salsa De Pomodoro ever having been manufactured in commercial quantities in the United States prior to 1916. I believe it was the first experiment in California. I visited the Greco plant at irregular intervals. They were busy at all times, either producing or endeavoring to correct faults in the machinery. I have been around canning plants frequently in the last 20 years and am fairly familiar with their operations. There was nothing being left undone that I could see in an effort to produce. I only know it was a very short delivery. My records would show but I have not looked it up. I was the broker in the transaction. The goods were not delivered to me. They were sent to New York. I know that it was accepted.

Mr. McNAB.—Q. In the term short pack as understood by the [142—107] canning trade, will a break down or a failure of the machinery to operate be accepted as a reason for a short pack?

(Testimony of Oscar Hoffman.)

A. I think so.

Q. Will you just explain the full significance as understood by the trade of the term short pack; just give some illustration of what it is intended to include; does it mean merely a shortage of crop or does it mean other things?

A. It includes a shortage of crop, a break down of machinery, or primarily causes over which the packer has no control, labor strikes and other conditions of similar nature, and fire.

Cross-examination.

The COURT.—Q. Are you speaking now only of your method of dealing, or of the acceptance by the trade generally throughout the country? That is what we are governed by?

A. I am speaking of the trade generally throughout the country.

Q. You want us to understand that the trade generally will accept the breaking down of machinery, without reference to the question of whether it is through the fault of the packer, or not, as a ground for a short crop?

A. I think they would; not a short crop, your Honor, but a short pack.

Q. I mean a short pack? A. Yes, sir.

WITNESS.—(Continuing.) I got this experience as to what the term short pack meant in this way: In our business we come in contact with it every season. We get short deliveries on some commodities; many hundreds of thousands of cases we sell

(Testimony of Oscar Hoffman.)

of canned goods, and there is not a year where we get a full delivery on a complete line. We are vitally interested in brokers in earning our commissions on a full line. When there is no delivery we get no commission, consequently we follow a man's order closely. [143—108] We do not get delivery ourselves. At times we are requested to accept on behalf of buyers. We did not do so in 1916 that I recall. I cannot recall whether I was authorized at that time to make any acceptance of either quality or quantity on behalf of the McNiece Company. I cannot recall any specific case of anybody with whom I have dealt making a short delivery on account of break down of machinery. I would like to qualify that by stating that there are many times when a packer's machinery will break down temporarily. I do not recall any specific case nor a single instance. I did not discuss with the members of the tomato trade the question of break down of machinery in its bearing on the question of short pack. I have heard break down of machinery discussed in a general way. I took no note of it.

Mr. LANNIGAN.—I understood you to say that short pack meant a short pack on account of crop being damaged by frost or rain, or any other well authenticated reason why the packer could not deliver; I will ask you to state what you mean by well authenticated reason.

A. By well authenticated reason I have in mind any reason by which a packer is prevented in good

(Testimony of Oscar Hoffman.)

faith from carrying out the full terms of his contract.

Q. Any reason at all?

A. Any reason at all in line with my previous statement.

WITNESS.—(Continuing.) I can only speak from the custom. I am only broker, I trade with hundreds and hundreds of people in the course of my career.

The COURT.—Q. I will put it this way: Do you know what the trade recognizes as the ground for a short pack—if you are only a broker?

A. They recognize—

Q. Do you know? You say you are only a broker; now do you know, and how do you know?

A. I know from the fact that they [144—109] accept short deliveries; they merely accept them; some they inquire and sometimes they do not; they keep fairly well posted on trade conditions themselves, in fact, they keep very well posted.

Mr. LANNIGAN.—Q. Is it not a fact that you never did have anybody accept a delivery and accept as a short pack, a delivery of tomatoes where there was a break down in machinery?

The COURT.—You mean on the ground of a break down in machinery?

Mr. LANNIGAN.—Yes, sir. Is it not a fact that you never have had that experience?

A. I cannot answer that and I would like to explain why if I might.

(Testimony of Oscar Hoffman.)

Q. Do you believe then that in the case of machinery a packer is entitled to experiment at the other man's expense?

A. I believe that a packer in selling his merchandise does the best that he can under the conditions under which he is operating. I have seen machinery break down, I have seen boilers go out of business, perhaps only for a day, where the percentage of delivery is not materially affected. I believe buyers know whether or not it is an experiment to a certain extent. That is my answer to your question.

WITNESS.—(Continuing.) I made trips to the plant of the Greco Company off and on during the season of 1916 and found them always busy. They were busy canning, casing, shipping, receiving. With particular reference to this Salsa De Pomodoro, I have found where they were working and where they were not working on account of the machinery breaking down and trying to rectify it, and I found them making salsa at the time. They were also canning tomatoes. I believe I bought some of their general pack that year besides the salsa. I do not know how many hours a day they were working. I usually went there Saturday afternoon. [145—110]

Redirect Examination.

Without defining all I can give some illustration of things that have been recognized by the trade for short packs; a shortage of cans, for instance. No matter what the packer has agreed to deliver, if he

(Testimony of Oscar Hoffman.)

has not had delivered to him by the manufacturer a sufficient number of éans, that is accepted as a reason for a short pack.

Thereupon the following took place:

The COURT.—Q. You would not know what would constitute a well ordered factory, would you?

A. In a general way I would, but not as regards this particular product.

Mr. McNAB.—Q. And is not the reason for that because this was the first year this was manufactured? A. Yes, sir.

WITNESS.—(Continuing.) For about twenty years I have been going into canneries where I have been buying goods and am familiar with the operations of an ordinary cannery and I can generally tell whether they seem to be working full time and making a standard production. Speaking of Mr. Greco's cannery, to the best of my recollection it appeared to be working. I do not want to get confused here. I paid many visits to the Greco cannery but this was three years ago.

Recross-examination.

To the best of my recollection there were times when the cannery was running to capacity and there were times when it was not. Most of the time the salsa was not running to what I considered capacity. I took particular pains to inquire why the production was not greater, and sometimes the salsa line stopped altogether for repairs to the machinery—in the middle of the pack, [146—111] I believe. There were times when the cannery was very busy

(Testimony of Oscar Hoffman.)

and times when it was not so busy. My recollection is that the salsa machinery was out of order for quite a long time—several weeks, that it stopped for several weeks at one time. That is my recollection; say two weeks, or something like that; and the other industry carried on in the factory went on just the same; one is independent of the other. During the time that it was suspended on the salsa side, they were working on the machinery.

Testimony of R. W. Crary, for Defendant

R. W. CRARY, being called as a witness for defendant, testified as follows:

I am a canner and canned goods broker. Have been engaged in the cannery business since 1901. Deal in peas, milk, fruits and vegetables. I operate a cannery at San Jose at the present time and have been since 1918. During my experience I have had an opportunity to familiarize myself with general customs and acceptances of the canning trade. The term “short pack” has a definite and accepted meaning in the canning trade in California. The term “short pack” is understood by the general trade to mean briefly failure to get the goods into the cans. A *pro rata* of production in the form of a short pack is a very frequent occurrence in the canneries. Instancing in a general way what the trade understands it to cover, I say failure of crop, failure of ordinary supply of cans, strikes, or, as we express it in our contracts frequently, contingencies over which we have no control.

(Testimony of R. W. Crary.)

The COURT.—Now that sounds reasonable. He means things that are beyond the control of the factory.

Mr. McNAB.—The contract in this case, your Honor, aside from the question of short pack, contains that additional clause.

Q. You say failure to get the goods into the cans?
[147—112] A. Yes, sir.

I am familiar in a general way with the product known as Salsa De Pomodoro. I know it was not a domestic product in the United States prior to 1916. I think there was not any machinery devised in this country to my knowledge for the manufacture of that product prior to that time. I have had experience as a canner since 1901, and have had to do with the general customs and acceptances of the canning trade since 1893. In addition to my experience as a canner I have engaged in buying and selling goods only as a broker. During that period of time I have familiarized myself with the operation of canneries and with the custom of the trade and the general acceptances of the trade and the reasons it will be accepted for failure to deliver goods up to the point of contract.

Q. Assuming that a canner engages to deliver a given quantity of goods but through unforeseen difficulties with his machinery notwithstanding his efforts he is unable to produce the quantity which he agrees to deliver, state whether or not the trade recognizes that as a justifiable reason for a short pack and a *pro rata* delivery? A. They do.

(Testimony of R. W. Crary.)

Mr. LANNIGAN.—One moment. I make the same objection to that question, your Honor.

The COURT.—The objection is sustained.

Mr. McNAB.—We save an exception.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 4.

Mr. McNAB.—Q. Assuming that a manufacturer engaged in the production of a product and installs machinery that had theretofore not been used in the United States for the production of that commodity, and notwithstanding his efforts in the manufacture of [148—113] the product he is unable on account of trouble with the machinery, which he was unable by the use of engineers to control, he failed to produce a sufficient quantity to fulfill the contract, state whether or not that would be accepted by the trade in California as a justifiable reason for a short pack and a *pro rata* delivery?

A. I am satisfied they would accept that as a cause for nondelivery.

Mr. LANNIGAN.—I move to strike out the answer of the witness as not responsive to the question.

The COURT.—The answer is not responsive. You will have to answer the question in a more definite way. You say you believe they would?

A. I know they would as I have had instances of deliveries that I have been compelled to make in that manner.

(Testimony of R. W. Crary.)

Mr. McNAB.—Does the answer stand, your Honor?

The COURT.—This is not the answer that was stricken out. This is a new answer.

Mr. McNAB.—I would like to save an exception to the order striking out the answer. I did not know your Honor ruled definitely on that.

The COURT.—Yes, I said it was not responsive. Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 5.

Mr. McNAB.—Q. What circumstances justifying a short pack would be incorporated under the common acceptation of the trade term, or other circumstances beyond the packer's control.

A. Specifically, failure of the usual sources of supply of cans or fuel; like of an adequate supply in labor; a break down in machinery; a failure of transportation, which might bring in the fruit.
[149—114]

The COURT.—Q. You don't mean failure in the usual sources of supply in cans and fuel to mean merely the failure of the packer to take usual and ordinary precautions to supply himself with those things, but the failure of the source of supply so that he could not get them?

A. He would have to satisfy the buyer as to his good faith in attempting to supply himself.

Cross-examination.

I am still in the packing business. I am not a stockholder in the Greco Canning Company and

(Testimony of Charles E. Hume.)

have no interest in it whatever. I have a separate cannery.

Testimony of Charles E. Hume, for Defendant.

CHARLES E. HUME, being called as a witness on behalf of the defendant, testified as follows:

I am a canner and packer. I have two plants located in California and two in Alaska. We pack fish as well as fruit. My company is one of quite large proportions in its output. It produces approximately 250,000 cases in California and about 150,000 cases of salmon in Alaska. I have been engaged in the packing and canning business personally 20 years. The company has been in existence since 1864. It is the firm of G. W. Hume & Company. During that time I have been engaged in the packing of fruits—tomatoes in a small way. I am familiar with the common understanding and acceptance of the trade, and the application by the trade of the use of the term “short pack.”

Mr. McNAB.—Q. Just describe to the Court what the term “short pack” is held by the trade generally to include? A. Do you mean causes? [150—115]

The COURT.—Yes, what causes are regarded by the trade as justifying a short pack?

A. There are hundreds of causes that may cause a short pack, but as regarded by the trade the particular thing that causes the short pack is not of so much importance as the effort put forth by the canner to overcome that difficulty. There are cans, fuel, shortage of sugar, explosion of boilers and

(Testimony of Charles E. Hume.)

many other things that will cause a short pack, but it must be shown that the packer, in the event of any of these shortages, has used reasonable effort to overcome them at the earliest possible moment.

Q. Then it must be beyond his control to fill it?

A. Yes, sir.

Testimony of L. E. Sussman, for Defendant.

L. E. SUSSMAN, called as a witness on behalf of the defendant, testified as follows:

I am a merchandise broker, specializing in canned goods. This is my third year in such business. It will be about three years at the end of this year. The bulk of my business has been with canned goods. I have had occasion almost every day in the course of my experience, to deal with the question of short pack. The question of prorate under a short pack is a matter of very frequent discussion in the trade. Almost every canned goods contract for future delivery has that clause embodied within it.

Mr. McNAB.—Q. And with respect to the frequency with which canners are compelled to meet this question, does it not arise on nearly every delivery in the year, more or less?

A. Almost every cannery is compelled to make short delivery on some one item or other almost every year.

WITNESS.—(Continuing.) I am familiar with the general understanding of the term “short pack,” and the reasons for it which [151—116] are accepted by the trade in California.

(Testimony of L. E. Sussman.)

Mr. McNAB.—Q. Just describe to the Court in a general way what that is intended to include, as you understand it in the trade?

A. The trade understands that the canner, in selling a certain amount of goods on a future-delivery contract is selling that quantity of goods in good faith, and expects at the time to deliver the full quantity that he sells; it is thoroughly understood by the trade, however, that if he does everything in good faith that he can to make full delivery, if he is prevented by circumstances beyond his control, then the trade in general will absolve him from responsibility of delivery, as long as he has done everything that he can in good faith to deliver in full and has not deliberately over-sold himself.

Q. And within the term “circumstances beyond his control,” state what the trade would recognize as being beyond his control?

A. Anything that he could not, in the exercise of reasonable precaution, prevent; for instance, if I might give an instance, if a canner should fail to make delivery because he has not sufficient cans, the trade would not excuse him if he did not order the cans, or if he did not order them within a reasonable time; for instance, as happened during this past season, canners were compelled to make *pro rata* deliveries on certain items because the American Can Company did not deliver certain sizes of cans to them on time. The American Can Company, as a matter of fact, could not itself deliver them on time because of the railroad strike, and that

(Testimony of L. E. Sussman.)

prevented them being put in the cans at a certain time. If the canner had not ordered those cans, I do not believe the trade would have absolved him from the responsibility of delivery; in fact, I know they would not. But, if it was beyond his control to get delivery, that would be different. [152—117]

Testimony of Elmer E. Chase, for Defendant.

ELMER E. CHASE, being called as a witness on behalf of defendant, testified as follows:

I am a fruit canner and at the present time president of the Canners' League. The Canners' League is an organization of canners in Central and Northern California that embraces probably 90 per cent of the canners in this section. I have been engaged in the canning trade for 41 years, all of that time in California. I have been engaged in that time in the actual canning of goods myself or as an employer. The Canners' League has offices in San Francisco, and deals to a certain extent with disputes between producers and purchasers, and the like. To some extent it acts as arbitrator and so on. I am familiar with the common acceptation and application of the term "short pack" in the canning trade.

Mr. McNAB.—Q. Will you just state to the Court what it is understood by the trade to include?

A. To include conditions beyond the control of the canner, where the canner has used reasonable diligence in providing against such conditions.

(Testimony of Elmer E. Chase.)

Q. What will be accepted as beyond a canner's control in applying that term?

A. Shortage of cans, injury from the elements, flood, fire, or even excessive heat, or a crop damage, labor troubles.

Q. Trouble in the factory? A. Yes, strike.

Q. Is there any absolute or arbitrary limit to the causes to which it will be applied, provided the canner has used diligence and good faith?

A. I should say not.

The COURT.—By the term “good faith” you mean as used in connection with the use of reasonable and proper efforts? [153—118]

Mr. McNAB.—Yes, if he has used reasonable and proper methods to produce the commodity and has not been able to produce the amount to be delivered, will the trade accept that as a reason for a short pack and prorated delivery?

A. That has been my experience.

Q. Are you familiar with the product known as Salsa De Pomodoro?

A. Not from any experience with it.

Q. It has not been produced as a domestic commodity in the United States prior to that time?

The COURT.—Mr. McNab, I don't suppose there will be any question about that.

Mr. LANNIGAN.—We have admitted it, your Honor, and have right from the beginning.

Mr. McNAB.—This is the first time that it has been admitted.

The COURT.—The whole course of the trial

(Testimony of Elmer E. Chase.)

shows that there has been no question about that.

Mr. McNAB.—Q. Assuming that a canner has agreed to deliver a certain commodity which theretofore had not been produced commercially in the United States, and assuming he installs the machinery to the best of his knowledge, and in good faith, that is applicable for the purpose, and that he operates it to the best of his ability, with engineers, but it fails, on account of structural or mechanical defects, to produce the amount of the goods which he has contracted to deliver, will the custom of the trade accept that as a justifiable reason for the delivery of a prorate or short pack?

A. I should say that the trade would.

**Testimony of Victor V. Greco, for Defendant
(Recalled).**

VICTOR V. GRECO, being recalled by the defendant, testified as follows:

I have made a search to ascertain whether or not we can find [154—119] the contracts that we had for the delivery of tomatoes from the acreage of 1916, but we have not been able to find any. There was no reason why we should have kept those contracts after 1916. I believe they must have been destroyed when we moved from our old office to the new office. Since I was on the witness-stand I have made investigation and computation to ascertain as closely as I could the acreage which we had under contract for delivery to us in Santa Clara in 1916. The acreage was between 500 and

(Testimony of Victor V. Greco.)

550 acres. The number of tons of tomatoes delivered to our cannery during the season of 1916 was a little over 2,000. I can estimate the amount of tonnage which there was in the acreage which we had contracted for delivery to us. We should have had not less than 5,500 tons delivered from that acreage, and there were delivered to us from that acreage a little over 2,000. The failure of the delivery of the remaining 3,000 odd tons was not due to any action on our part.

Mr. McNAB.—Q. Possibly you have answered this before, but I want to be absolutely sure about it, and I will ask you the question again: What engineers did you have in superintending the operation of this plant for the production of the Salsa De Pomodoro?

The COURT.—That all has been gone over. He said the man who constructed it came down there and installed it.

A. Also Mr. Davis.

The COURT.—That is, Mr. Davis testified that he supervised it.

Mr. McNAB.—Q. Mr. Davis has become an authority on that subject, has he not? A. Yes, sir.

WITNESS.—(Continuing.) There was absolutely not anything at all spared in effort in order to produce the full quantity that was [155—120] expected to be produced by that machine.

Cross-examination.

I do not know a man named Davis of the Pacific Vinegar Works or the California Vinegar Works,

(Testimony of Victor V. Greco.)

but I know of him. I do not think he made Salsa De Pomodoro that year. I think he started to make it in 1917. He uses the old primitive method of an open kettle, the way they made it in Sicily before the modern method was adopted. The open kettle method is pots and open kettles. You put the pulp in there and cook it down to the consistency that is proper, but it does not make a good quality. That is the old method, and the method we were using is the new method, the modern method as adopted in Naples several years ago, prior to the manufacture of the product in this country.

**Testimony of Charles A. Davis, for Plaintiff
(In Rebuttal).**

CHARLES A. DAVIS was thereupon called as a witness by plaintiff in rebuttal, and testified as follows:

I live in Alameda County and am in the packing business in San Francisco. The name of my firm is California Conserving Company, and I am general manager. Have been in the business about 30 years, packing vegetables, fruit and the like, including tomatoes. During that time I have packed tomato paste known as Salsa De Pomodoro. I am familiar with the product. In my experience in the packing business I have had an opportunity to make myself familiar with the terms used in the trade. I am familiar with the term "short pack" as used in packing and selling products. It simply

(Testimony of Charles A. Davis.)

means that if you are supposed to pack 50,000 cases of goods, for instance, and you only pack 25,000, on account of the fact that the ground or acreage that you had set aside or reserved [156—121] for that purpose did not produce any more than that amount, and the contracts booked by the trade have therein a clause which excuses or excepts the manufacturer and producer from being called upon to deliver more than the acreage did make it possible for him to produce.

The COURT.—Do I understand that it refers to a failure or a partial failure of the crop from one cause or another? A. Yes, principally.

The WITNESS.—(Continuing.) I am familiar with the method of making this tomato paste known as Salsa De Pomodoro. There are two methods that have been tried, two that I have tried. One is what they call the vacuum pan process and the other the open kettle process. I have made Salsa De Pomodoro with the vacuum pan process as near as I can recall either in 1915 or 1916. I used vacuum copper kettles. It is a closed process, used to concentrate quickly and freely. Describing the appliance, it is a copper kettle with a closed top, buckled down with a manhole plate in it. Then you do your cooking in there, and everything is concentrated right in that enclosed affair. It is very plain and simple; there is nothing much to it. That vacuum pan that I used have no tubes in it. I am not familiar with the method of the vacuum pan that has tubes in it, through which the paste is

(Testimony of Charles A. Davis.)

drawn. The other method of making the Salsa De Pomodoro is the open kettle method. We are not making the Salsa De Pomodoro now. We were this season. We were making it in 1916, with the open kettle. We think we get a good product with the open kettle. The open kettle method is simply cooking in kettles that are open-topped, from which the steam is emitted, and after a certain period of cooking that concentrates down to this same relative consistency as is obtained in the vacuum kettle. It is a process [157—122] of cooking down.

The COURT.—Q. Does it take longer by one method than the other?

A. Yes. This open kettle method is the longest, because there is less concentration of heat.

Mr. LANNIGAN.—Q. As to the two methods you used, which do you consider the best?

A. The open kettle.

Q. You used that yourself? A. Yes.

The WITNESS.—(Continuing.) We manufactured it in 1915 or 1916. The first year we had this vacuum pan, I think it was 1915, and in 1916 we resorted to the open kettle method, and have since stuck right to it, and have increased our capacity from year to year in the same since.

Q. Do you remember whether there was any shortage of material or fruit in 1915?

A. 1915 I am not so sure of, your Honor. 1916 I am more acquainted with. 1915 I could not recall with any certainty.

(Testimony of Charles A. Davis.)

Cross-examination.

Mr. McNAB.—Q. Mr. Davis, in 1915 is it not true that nearly all the packers put up such a large pack that they had an excess quantity carried over into 1916? A. I don't know that.

Q. Do you know whether or not it is true that the majority of the canners carrying tomato products in Central California declined to write up orders in 1916 on the ground that they had such an excess product over from 1915 and thereby in 1916 many of them were able to make full deliveries?

A. I don't know that.

Q. What were the crop conditions in 1916?

A. We delivered 58%.

Q. Of what various products?

A. Tomato paste.

WITNESS.—(Continuing.) As near as I can recall we had contracted [158—123] to deliver 45,000 cases—between 45,000 and 50,000 cases, that we were under contract to deliver, and we actually did deliver only 58% of that.

Q. Did your contract clause permit you to pro rate delivery in case of short pack?

A. Just like the canners' contract.

Q. It is the canners' regular contract?

A. Yes, the same thing as is in common use in San Francisco.

Q. What was the reason for making a short pack during 1916, Mr. Davis?

A. We made our deliveries based upon the production of our acreage.

(Testimony of Charles A. Davis.)

WITNESS.—(Continuing.) Our acreage is in Alameda County. We were able to pick our entire acreage. Our acreage, however, fell short of our estimate. We were only able to deliver 58%. By pro rate delivery I mean a percentage delivery—an equal percentage as the entire contract is related to the amount that we actually were able to deliver. You understand when I say 58%, that is the average, some people, for instance, getting maybe more than 58% and some 55. That is because we made delivery early in the season, before we knew what we were going to have. That is quite customary in the trade with us. I would not care to answer whether it is customary with all packers. The question of short pack is one which comes up practically every year with every canner, more or less, in some variety of product.

Q. That is, nearly every packer, big and little, who is producing a variety of products, makes a short pack on one or the other of his products?

A. So it seems to be.

WITNESS.—(Continuing.) It is not a question that is very frequently disputed or investigated by purchasers, as long as there is good faith. It is true that in determining whether or not the packer has a right to make a short pack his good faith in making [159—124] efforts to try to do his utmost is considered by the trade. Short acreage is the only reason that we would advance in connection with our particular establishment.

The COURT.—What are we trying to get at, Mr.

(Testimony of Charles A. Davis.)

Davis, is the understanding of the trade, generally, as to what that term implies as a basis for a short pack.

A. Well, this contract reads in the event of strikes, or fires, or causes beyond control, etc., but materially speaking I would say that the only reason that larger deliveries or more complete deliveries are not made as a general rule is because of the fact that the acreage does not produce.

Q. That there is a failure of production of crop?

A. For instance, we base our contract, or rather, our estimated returns from an acre of tomatoes, we will say, of 10 tons; naturally, if we got five, or if we got six, we could only make 50 or 60 per cent of our total delivery, or thereabouts. If we should get 12 or 15, then we would have an excess.

The COURT.—Q. I was going to ask the witness if it has ever, in his observation, fallen within that term, in the understanding of the trade, trouble with machinery, the producing machinery or the vacuum machinery that causes delays—if that term short pack would cover a failure on that ground?

A. Your Honor, I would only answer that question by stating that we have never experienced any such trouble, and I don't know of any one that has, so that I could not say.

Mr. McNAB.—Q. You don't know, then, what the general trade rule would be on that?

A. I do not.

WITNESS.—(Continuing.) That was our second year. The first year we used the vacuum and

(Testimony of Charles A. Davis.)

open kettle. I could not answer whether we made full delivery in 1915. [160—125]

Q. Now, assume that you contracted to deliver 45,000 cases, Mr. Davis, and your machinery, your vacuum process, or whatever you call it, failed to operate to your satisfaction, notwithstanding you put all your efforts into making it go and you were not able to produce the amount that you had contracted for, would you consider that a justifiable reason for prorating the short pack?

A. I guess I would have to; if it was so, I could not do otherwise.

Q. What I am getting at is, in the trade, the question of the good faith of the packer in endeavoring to do his utmost to produce is considered?

A. That is the basic principle upon which we work and handle our business, if we can do a thing and it is within the realm of possibility to do it, we do it; if we cannot do it, we give a good reason as to why we do not.

Q. As a matter of fact, these excuses in trade, or reasons, cover quite a variety of reasons, do they not? A. They do.

Q. It is not customary in the trade for those to be disputed by the purchaser where the canner has been doing his utmost in good faith to fulfill, is it?

A. We have never experienced any.

WITNESS.—(Continuing.) The canners' contract is quite an extensive contract.

There was thereupon handed to the witness and considered by the Court, by consent of both parties,

(Testimony of Charles A. Davis.)

the canners' league of California form of contract. The clause relating to short pack therein reads as follows:

"In case of short pack, or government commandeering, requisition or reservation, by reason of which seller is unable to make full delivery of any of the goods specified, delivery shall be prorated . . . If seller shall be unable to perform any or all of [161—126] its obligation by reason of strike, flood, fire, crop damage, failure of transportation facilities, or for any cause or condition beyond seller's control, such obligations shall at once terminate and cease."

WITNESS.—(Continuing and referring to the contract.) I think that is the one they recommended. We have changed ours somewhat, but the release clause or exception we have continued to carry out.

Thereupon a colloquy between Court and counsel in discussing respective views as to said contract took place.

WITNESS. — (Continuing.) This Canners' League contract which the Court is now examining has been elaborated within the last year or two and particularly during the war. It contained originally I think a provision simply saying in case of short pack delivery could be prorated. The application, however, of that clause, has not been extended in practice any more in the last few years than it was before. I think I first started to manufacture Salsa De Pomodoro in 1915. That was our first

(Testimony of Charles A. Davis.)

year, and we did not pack so much. We considered it more or less of an experiment then. We never had made it before. We had our superintendent for the purpose of producing the pack. He was not an Italian.

Q. Had he ever had any particular experience in the manufacture of the commodity?

A. Experimented only.

Q. He had experimented only. About how long had he experimented? A. A year.

WITNESS.—(Continuing.) I did not make inquiries to determine whether or not there was any machinery made in America, specifically manufactured for the purpose of producing the product known as Salsa De Pomodoro.

Q. You made no inquiry?

A. Because there was none available. [162—127]

Q. What do you mean, no machinery available?

A. Not at that time, not for the making of that particular article.

The COURT.—It never had been produced in America before? A. No.

Mr. McNAB.—Q. That is, there was no machinery produced in America for the making of that article? A. Not as far as I know.

WITNESS.—(Continuing.) The machinery that I subsequently utilized for the purpose was machinery manufactured for general purposes which I utilized for that specific purpose. The vacuum process that I used had compression tubes, but not inserts. It had circulating tubes.

(Testimony of Charles A. Davis.)

Mr. McNAB.—Q. The machine which we have under consideration in this particular case had 204 tubes over each pan; did your machine have any such equipment? A. No.

The COURT.—And the process involved a forcing of the material being treated through these tubes, instead of being boiled in pans; it was forced through these tubes, and the evidence tends to show that by reason of the rotation of intense heat, that in passing through these tubes, about an inch in diameter, this material would become baked and hardened, and clog up and choke up the tubes, and stop the whole process.

A. No, that is a new one on me.

Q. Your method did not involve that?

A. No, nothing of that character.

Mr. McNAB.—Do you know anything as to the comparative methods of the product produced by you and by the Greco Canning Company? Did you ever have occasion to compare them?

A. No.

WITNESS.—(Continuing.) I don't know, either in trade or otherwise, what their relative consistency or flavor was. I don't [163—128] know that it is true that as manufactured by the open kettle process one fails to get the same flavor that you do by the vacuum process. I don't know whether that is true or not. As a matter of fact I know that in the manufacture of the Italian commodity known as Salsa De Pomodoro there is a peculiar kind manufactured in and about Naples

(Testimony of Charles A. Davis.)

known as the Naples variety. I do not know whether it is manufactured by the vacuum process or not, nor do I know as a matter of fact that it is a very highly flavored and desirable article among the Italians. I didn't know that a firm by the name of Krenz & Company were in 1916 engaged in attempting to perfect machinery for the production of this particular commodity.

Mr. McNAB.—Q. There was no machinery that you know of that had been manufactured in America specifically for the producing of this commodity? A. Yes.

Q. Your answer is what?

The COURT.—You said there had been none, and he answered affirmatively, of course, that there had been none. If he said no, then that would have negated your inquiry.

Mr. McNAB.—I understood the witness, but on the printed page of the transcript it might look differently. You mean there was no such machinery?

WITNESS.—(Continuing.) I have seen the Italian product now and then. I have never made the comparison between the product produced in Sicily by the open kettle method and the product produced in and around Naples. I don't know as a matter of fact that the commodity known as Salsa De Pomodoro produced by the open kettle method in Sicily is not considered generally acceptable by the trade in this country. I don't know one way or the other.

Mr. McNAB.—Q. Well, now, do you say that if

(Testimony of Charles A. Davis.)

you contracted, [164—129] Mr. Davis, to produce a given quantity of the product and you based your contracts on your estimate of what your acreage will produce, and your acreage, although you pick it clean, fails to produce the quantity that you had contracted for, that nevertheless the trade recognizes that is a justifiable reason for short pack?

A. They have always in our particular case.

Q. And have done that before this Cannery League contract was elaborated to its present condition?

A. They have done that, I will say, since including 1916.

Q. So long as you have had experience with the trade, is it not a fact that regardless of what the law might be in holding a man to a contract, has not the trade, where in good faith you make a mistake in your estimate of what you can produce from your acreage, and you fail to produce a requisite quantity, has the trade not universally recognized that as a justifiable reason for short pack?

A. I understand the question. On such occasions as we have had to go to the trade with excuses or reasons for short pack, my reasons or excuses have always been acceptable.

The COURT.—What were those reasons? That is not an answer to the question. He has given you a specific ground for failure, and he is asking you if the trade would recognize that. If you don't know, say so.

A. Yes, your Honor, I know it, in this sense only,

(Testimony of Charles A. Davis.)

that, for instance, if we have 1,000 acres of tomatoes contracted for and we have based our future sales, as it were, on the extent of getting 10 tons to an acre and then through weather conditions or some unforeseen condition arises, should we only get a yield of five tons to an acre—

The COURT.—The witness is not answering the question at all, [165—130] but has a different thing in mind. . . . It does not make any difference. I want the witness to answer the question that is put to him. Read it. (Question read.)

A. Yes.

Mr. McNAB.—Q. Universally, a destruction of crop by weather conditions is recognized as a justifiable reason for short delivery, is it not?

A. Yes.

Redirect Examination.

We had our superintendent experiment for approximately a year with this paste-making machinery before we sold it. You see, we had southern tomatoes, then we had northern tomatoes, whenever we could get tomatoes, at various times, and send those tomatoes to our factory. During that time we were not selling any of the paste while we were experimenting with it. We did not try to sell it to anybody. We did not want to experiment with paste.

Recross-examination.

This experimenting was only on a small scale, just with a kettle and seeing whether or not we could produce a proper consistency by cooking.

**Testimony of Charles H. Bentley, for Plaintiff
(In Rebuttal).**

CHARLES H. BENTLEY, called by the plaintiff in rebuttal and testified:

I am with the California Packing Corporation. That used to be the California Fruit Cannery Association, and that corporation has succeeded to the California Fruit Cannery Association as well as other concerns. I am general sales manager. I have been in the business of packing fruits and vegetables for upwards of 35 years. During that time I have had occasion to familiarize myself [166—131] with the meaning of trade terms that are used in contracts of sale. I am familiar with the term used in tomato contracts, "short pack." This condition in the selling contract as generally used is the outcome of the effort to divide the hazard of crops. The custom is for the canner to contract with the growers early in the year, not for a specific number of tons, but for a given acreage, the canner assuming a large part of the risk of the out-turn, because he has certain overhead expenses to meet regardless of the crop yield; accordingly, he goes to the trade and sells for forward delivery, and bases his sales, usually, on a conservative estimate of the yield he may expect from the acreage he has under control; and in selling on a pro rate contract for delivery, after packing he asks the wholesaler to assume with him a part of the crop hazards; the grower would have no liability in the case of the utter failure of the crop, and,

(Testimony of Charles H. Bentley.)

on the other hand, in most cases the canner would have to take whatever would be produced on that acreage. Accordingly, the trade has recognized the need and the fairness of the prorate contract, based on what is known as the short pack.

The COURT.—Now, then, if I understand that, Mr. Bentley, the term “short pack” relates to and covers an inability to make a pack sufficient to fulfill contracts in their entirety through failure of the crop, from one cause or another.

A. Through failure of the crop, and the contracts, as a rule, then provide for protection against other hazards in the way of natural hazards.

Q. The question simply covers now the meaning of that term “short pack”—what that covers; the others are, as you say, covered by other terms, strikes, fires, etc., I suppose.

A. Strikes, fires, floods, natural causes beyond control, natural [167—132] causes for a prorate delivery.

WITNESS. — (Continuing). The California Packing Corporation own and operate a cannery in the Santa Clara Valley called the Central California Canneries. In 1916 the California Packing Corporation made fully delivery on its sales of tomatoes and tomato products from the pack of that plant, as well as its other plants, 100% delivery.

Cross-examination.

I don't recall how many acres they had under lease or contract for delivery to us. Most of those contracts ran with people who are not the owners of the

(Testimony of Charles H. Bentley.)

property, but lessees of the property. They may be migratory people, who may be on this ranch this year and on another ranch another year. As a matter of fact, I think they would hardly be called migratory, however. Generally they are with lessees of property. They are frequently with foreigners, that is, with people who are in the habit of devoting their peculiar abilities to the raising of crops.

Q. Now, did your cannery, in 1915, carry over an excess pack into 1916? A. I do not recall.

Q. Is it not a fact, Mr. Bentley, that in 1915 there was universally throughout the trade not only a full pack, but an excess pack? A. I do not recall.

Q. Is it not a fact, Mr. Bentley, to refresh your recollection, that as a result of the pack carried over there was comparative reluctance on the part of canners in 1916 to sign up an excess contract for delivery?

A. Not as far as I know. I am speaking now with reference to the business of canners all over the State of California.

Q. But in the Santa Clara Valley, you don't know, of course, [168—133] how many acres you had contracted for. I presume that you did go out and try to contract an acreage which would be more than sufficient to supply the wants of your cannery?

A. Yes.

Q. Do you know whether or not you took out of the fields everything that the growers had to offer?

A. It would be impossible to take everything that they had to offer in any season, because there would

(Testimony of Charles H. Bentley.)

undoubtedly be some defective material; there always has been and always will be.

WITNESS.—(Continuing.) In the year 1916, some of the growers that we had contracts with had a portion of their crop destroyed by the weather. Under ordinary conditions we figure 8 tons as the average yield of tomatoes per acre in the Santa Clara Valley. It varies, in that one tract produces very much more to the acre than the other, on account of soil conditions or other peculiarities. They have only gone to 25 tons per acre in certain patches where they are subject to irrigation, and those fields are not in any way typical of the district. I have no data with respect to the amount that is subject to irrigation in the valley, but we have figures indicating that 8 tons is about as fair as we would ordinarily figure in our Santa Clara acreage; that is on an unirrigated patch, on the average of the valley, including the irrigated patches. I should say it was rather unusual to produce between 20 and 25 tons to the acre where they do irrigate; it has happened. I do not know anything concerning the acreage which was under contract for delivery to the Greco Cannery in 1916.

Q. One of the witnesses has testified that his idea would have been 25 tons to the acre, had it not been destroyed. Do you know anything about those particular acreages?

A. I know something of them.

Q. You know that there are such acreages in the Santa Clara Valley [169—134] that produce that much?

(Testimony of Charles H. Bentley.)

A. Yes. As I said before, though, I would not regard that as typical of the district, nor would I regard a man as proceeding conservatively to sell against any such yield in advance.

Q. Now, we are not contending that. Mr. Bentley, what proportion of the crop in tonnage per acre was destroyed in the Santa Clara Valley by weather conditions in 1916?

A. I should not think over 15 to 20 per cent.

WITNESS.—(Continuing.) That is the total estimated tonnage. By estimated tonnage I mean a conservative estimate of what the valley should produce.

Q. Have you any data or figures giving the per cent of destruction by the weather conditions in 1916?

A. Our green fruit department has some figures, I think, bearing on that subject. The circular letters that the sales department issued to the trade during the packing season and at the close of the packing season made reference to the rain damage in a general way, but the final statement was made that we were able to make 100% delivery with the damage that had been done.

Q. Of course, you don't know what excess acreage you had over requirements of your cannery under contract?

A. I know that in accordance with our usual practice we had sold for future delivery approximately 75% of what we could reasonably hope to pack.

(Testimony of Charles H. Bentley.)

WITNESS.—(Continuing.) That was based upon an estimate in advance of what we thought the acreage would produce. In 1916, at none of our canneries, did we produce commercially a commodity known as Salsa De Pomodoro, nor in 1917. We do not now. We produce what we call a tomato sauce, which is somewhat similar, except it has not the same degree of evaporation. It is produced [170—135] in an open kettle. We brand it on the market tomato sauce. It comes in competition with the Salsa De Pomodoro, although of course it is sold at a much less price, on account of the lower degree of evaporation. The commodity commercially known as Salsa De Pomodoro to the Italian trade is an evaporation to the point where it is quite dense, a heavy, thick consistency paste. The Italians use it in making soups, and more particularly in dressing macaroni. In buying it in the concentrated form they regard it as more economical, because they can thin it down with water. As to the failure of the crop in 1916, through weather conditions, it was not serious. I said from 15 to 20%. I should say that the question of short pack is applied to the district in which the canner operates. I heard the latter part of Mr. Davis' testimony.

Mr. McNAB.—Q. Mr. Davis testified that he contracted to deliver about 45,000 or 50,000 cases of a given commodity, that he picked his crop, but he did not produce sufficient tomatoes to produce a given commodity, and he short delivered. Does

(Testimony of Charles H. Bentley.)

the element of good faith on the part of the packer enter into this matter at all? A. Very much.

Q. If regardless of law, now, Mr. Bentley, and coming down to the custom of the trade, a packer of repute to the knowledge of the trade has done everything apparently within his power in good faith to produce a product and has not been able to do so, isn't that taken into consideration in determining whether he is justified in short delivery?

A. It is taken into consideration, doubtless, but at the same time I think that the trade would expect a man to use ordinary diligence and intelligence.

Q. Assuming that a packer is a man of good reputation in the trade, and he exercises, to the knowledge of the trade, good faith in [171—136] trying to produce a sufficient amount of a given commodity to satisfy his contracts, and uses ordinary diligence, in order to produce it, aren't those factors taken into consideration in determining whether he is justified in making a short delivery?

A. If you add average ordinary diligence in selecting the acreage of ground in which his crop was to be provided. If I may illustrate the point I have in mind, not a year like the past year, where there was an extraordinary demand and many people attempted to plant tomatoes in districts which were not proven and where the soil was not suitable—the trade would not accept that as a justifiable ground for short pack, feeling that the

(Testimony of Charles H. Bentley.)

entire risk of an experiment of that kind ought not to be put upon the trade.

Q. Assuming that a packer estimates in good faith and on the average yield of the acreage that he would have under contract or would have delivered 5,500 tons at his plant; as a matter of fact, on account of weather conditions they deliver at the cannery only 2,400 tons, you would consider, would you not, that he had used proper precautions and ordinary diligence with regard to protecting his interests?

A. It would depend entirely on how many acres he was figuring on getting that from and the character of the acreage.

Q. About 550 acres.

A. We would not regard 10 tons an acre as a conservative estimate in the Santa Clara Valley.

Q. Taking your estimate of 8 tons to the acre, Mr. Bentley, which would be 4,400 tons, would it not? A. Yes.

Q. Now, let us disregard the testimony of some witnesses here who said that they picked nearly 25 tons to the acre; let us take your estimated production of 8 tons on 550 acres, which would make 4,400 tons under contract, and they actually only delivered 2,400 tons. Now, was that not more than a sufficient estimate of the needs of [172—137] his cannery?

A. Well, there might have been other factors entering in.

(Testimony of Charles H. Bentley.)

WITNESS.—(Continuing.) If he got all of the yield on his acreage and that was fairly typical of the conditions in that district, I should say that the trade would release him from liability if he delivered all that he could reasonably expect to pack out of the acreage that was selected with reasonable care and diligence. We would figure that we were safe in selling up to 8 tons to the acre on typical acreage, provided it was proven ground. In 1919 our cannery delivered 100% No. 2½ cans, solid pack, and we only delivered between 85 and 90% of No. 2. They are made out of the same tomato, but we had a railroad strike during the canning season, when we were unable to get cans for several days, and in fact it ran into a considerable period of that time; during that time the tin plate was short on the size of the plate from which No. 2 cans are made.

Mr. McNAB.—Q. Well, now, Mr. Bentley, assuming that you contracted for a sufficient number of cans, and the cannery failed to deliver to you the requisite number of cans, under the short pack clause, aren't you justified in making pro rate delivery?

A. Under any conditions beyond our control—if the canner fails on account of a railroad strike his contract protects him just as ours protects us.

WITNESS.—(Continuing.) I question very much whether we would have any right to expect the trade to protect us, unless the shortage of cans arose from conditions such as I have named, that

(Testimony of Charles H. Bentley.)

is, a strike; the can company would certainly protect us against failure to deliver under our contract in a case of that kind.

The COURT.—Q. In other words, if I understand you, these causes must be things that put it beyond your control? [173—138] A. Precisely.

Q. They do not grow out of any question of your own exercise of diligence and things of that kind?

A. That is exactly the case, your Honor, the whole validity of the canner's contract providing for a pro rate delivery. It depends, as counsel said, very largely on the good faith of the canner. If there was a tendency to bring in extraneous reasons which would excuse him from making a full delivery, it would strike at the validity of the contract and make it impossible for us to deal with the trade on a pro rate contract; consequently, in trade practice and in aspects of the trade, I think I am perfectly safe in saying that the disposition has been, even among the canners themselves, to compel their people in similar lines of business to live strictly up to the terms of the contract and interpret the short pack entirely within what might be regarded as arising only from natural causes; that is to say, a short pack would only be justified where the conditions arose from natural causes.

Mr. McNAB.—Q. You do not mean to say that the Canners' League has restricted the term "short pack" to that narrow limit, do you?

A. I am inclined to think it has.

Mr. McNab thereupon asserted that the secretary

(Testimony of Charles H. Bentley.)

of the Canners' League had testified to the contrary. After a colloquy between Court and counsel witness proceeded: The point I am trying to make, your Honor, is simply, if the industry is able to continue operating along the lines of selling for fall delivery or delivery of the goods to be made hereafter, it is going to continue to divide the crop hazard risk with the grower and with the trade, he must be able at all times to justify his position with the trade and convince the body that he is acting not only in good faith, but that he is acting with reasonable care and diligence, and that he is [174—139] not going to fall back on the short delivery clause of his contract for reasons unless they be extraordinary or unusual, or conditions that are absolutely beyond his control. I recognize the fact that the manufacture of Salsa De Pomodoro was a new commercial business in this country in 1916. I would not go so far as to say that there was no machinery specifically devised in this country for its manufacture. I know that it was perfectly easy to make Salsa De Pomodoro, as it is being done to-day. I am inclined to think that there is some variation in any type of Salsa De Pomodoro, whether made by Greco or anybody else, much depending upon the quality of the materials he is handling, and the particular time in the season. I have seen samples of the commodity he produces. It is an excellent quality and undoubtedly produced with great care.

Mr. McNAB.—Q. Now, this machinery was in-

(Testimony of Charles H. Bentley.)

stalled in 1916, and never therefore, according to the testimony of the witnesses, had been applied to that purpose before. It was a vacuum process containing a large number of tubes, 204 tubes to the pan. It develops that these tubes choked up to the extent that they had to be drilled out with electric drills, sometimes requiring an hour and sometimes days at a time. In the following year that was remedied by discovering that a larger tube would accommodate the material and not stick so easily. Assuming that the canner, with the knowledge of the purchaser, goes out to install machinery and did install the best machinery that he could find adaptable to the purpose, to his knowledge, and operated it conscientiously with his engineers, and in spite of his efforts was unable to produce more than sufficient to make a prorated delivery, would not those causes be taken into consideration by the trade? A. I should think not. [175—140]

Q. You think not. Now, do you know anything at all, Mr. Bentley, concerning the acreage which was under contract to supply the Greco Canning Co. in 1916? A. I do not.

Q. You do not know anything about the tonnage they produced? A. No.

Q. Now, Mr. Bentley, most of these matters in the Cannerymen's League to which you have referred are settled by arbitration, are they not?

A. Usually.

Q. That is, they appoint an arbitration board,

(Testimony of Charles H. Bentley.)

consisting of a grower, a canner, and a wholesale grocer, and they determine the matter, and therefore there are not many suits now?

A. No, there are not.

Q. Prior to the time that the Cannery's League reached its present power, suits in regard to these matters were quite frequent, were they not?

A. I think not.

Q. Was your company ever sued?

The COURT.—What is the object of this inquiry? I mean what is the materiality of it?

Mr. McNAB.—I expect to show that every canner in business has been sued on these short packs, and it was determined in most of them that the element of good faith determined the whole transaction; it was not alone limited to crop conditions.

The COURT.—I do not think that would be proper evidence. I do not regard the inquiry you are now directing to the witness as at all material to the case.

Mr. McNAB.—Your Honor will allow us an exception on that?

The COURT.—Yes.

Which exception the defendant hereby specifies as

DEFENDANT'S EXCEPTION No. 6.

By consent there was thereupon received in evidence and marked [176—141]

Defendant's Exhibit "RR," a copy of the official weather report relating to Santa Clara County taken by the Weather Bureau. It reads as follows:

Defendant's Exhibit "RR."

"WEATHER REPORT, 1916.

September Rain 60/100 of an inch falling on the 21st heavily (42/100), the 30th (18/100). No frost.

October Rainfall 84/100 of an inch. Entire fall taking place on the 3d-4th-5th of the month. No frost.

November Rainfall 41/100 of an inch—frequent frosts occurred in the early part of the month with killing frosts on the 14th, 15th & 16th.

The temperature on the morning of the 14th was $26 \frac{9}{10}^{\circ}$, being the lowest on record for the month of November.

The following notation appears on the records of the 14th:

"Very severe frost which killed the second crop of grapes & tomatoes."

The mean temperature on above dates was lowest on record for the month." [177—142]

The above constituted the evidence submitted in the case. Thereafter the case was argued before the Court and was taken under advisement.

And on the 30th day of August, 1920, the above-entitled court, Honorable W. C. Van Fleet, Judge thereof, presiding, filed the following written decision concerning the facts and the law in said action:

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

No. 16,076.

Hon. WM. C. VAN FLEET.

P. PASTENE & CO., INCORPORATED, a Cor-
poration,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,
Defendant.

VAN FLEET, District Judge.

Action to recover for breach of contract to manufacture and deliver three thousand (3,000) cases of Salsa De Pomodoro, or Italian tomato paste, in the crop season of 1916.

There was delivery under the contract of but six hundred and sixty-five (665) cases or about twenty-two per cent (22%) of the quantity contracted for, and the action proceeds upon the theory that the plaintiff is entitled to recover upon the basis of a full and complete delivery of the quantity contracted for.

The defense is based on this provision of the contract: [178—143] “In case of short pack, seller agrees to make prorated delivery. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire or other circumstances beyond its control, such obligations shall at

once terminate and cease.” The defendant’s claim is, in substance, that there was a “short pack” within the meaning of the contract, resulting partly from a very considerable failure in the tomato crop by reason of weather conditions, and partly from trouble with defendant’s processing appliances which caused great delay and difficulty; that by reason of these conditions defendant was compelled to make a prorated delivery; that plaintiff received its full *pro rata* of the pack actually made, which was all it was entitled to. The different elements of this defense will be considered.

1. As to a failure of the crop, it is sufficient to say that the evidence, which is more or less conflicting, is not sufficient to sustain that feature of the defense—at least to any such extent as that claimed. There was evidence tending to show that early rains and frosts damaged the crop to some extent and thus decreased production, particularly in the Santa Clara Valley, the territory more immediately surrounding defendant’s plant, but it was not only very indefinite as to the real extent of the injury in that valley but wholly so as to the effect in other fields of production in adjacent counties where it appeared the tomato is largely grown; and there being nothing in the terms of the contract requiring that the goods contracted for be produced from tomatoes grown in any particular section, it was essential to sustain this defense, even had there been a more complete failure in the immediate field, to show that the fruit could not have been secured in other parts of the State in

quantity to fulfill the contract. *Newall, et al. vs. New Holstein Canning Co.*, [179—144] 97 N. W. 487. The evidence discloses no such effort in this respect as would establish inability to get the fruit elsewhere or to excuse the failure to perform the contract to the great extent shown. To the contrary I am satisfied that taking all the evidence into consideration and giving the defendant the benefit of every intendment and deduction making in its favor as to failure or damage to the crop, the Court would be wholly unwarranted in finding the defendant justified in abating more than twenty per cent (20%) from a full delivery under its contract.

2. As to the delay and difficulty encountered by defendant from trouble with its paste-making machinery, it is not and indeed could not well be seriously claimed that such a cause would ordinarily come within the definition of a "circumstance beyond its control" which would excuse performance by defendant within the terms of the contract. *Carnegie Steel Co. vs. United States*, 240 U. S. 156; *Morgan Lyall*, 16 Quebec K. B. 562; *Connersville Wagon Co. vs. McFarlan Carriage Co.*, 166 Ind. 123; *American Bridge Co. vs. Glenmore Distilleries Co.*, 107 S. W. 279; *Credenburgh vs. Baton Rouge Sugar Co.*, 28 Southern, 122. But the claim under this head is first, that the custom in the packing business is to recognize such causes of delay as justifying a "short pack," and second, that independently of this custom the parties themselves put that construction upon the contract and that the

Court is bound thereby. But the evidence on the subject is too vague, unsatisfactory and conflicting to enable the Court to find the existence of any such custom. It tends strongly, to the contrary, to indicate that nothing is ordinarily regarded by the trade as justifying a "short pack" other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character. Nor do I think the evidence sustains the contention [180—145] that the parties in their dealings have given the contract any such construction as that contended for. This claim is based solely upon certain passages occurring in the correspondence carried on during the time the goods were being processed. Quite early in the packing season the defendant wrote plaintiff of difficulties being encountered with the processing machinery which were causing delay and that by reason of that and because "the crop this year is very short as we have had considerable rain which has caused much damage," it was predicted that the pack would be as low as twenty-five per cent (25%). In answer the plaintiff wrote expressing regret over the difficulties being encountered and disappointment at the prospect of a "short pack" and, expressing the hope that defendant would find conditions improving, said: "At this time we will only state that if you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course,

that in any case we shall expect a full *pro rata* delivery of all such goods as you are successful in producing.”

There were later references in the correspondence to the same subject but none bearing more definitely on the question of a practical construction of the contract than those given. It is quite obvious that there was nothing in the suggestions made by plaintiff in reply to a recital by defendant of the difficulties encountered which could be seized upon as tending to show that plaintiff was giving the contract a construction in any respect differing from that its language would import. The defendant had mentioned to plaintiff, as one of the difficulties presenting itself, a short crop resulting from weather conditions, a thing [181—146] which plaintiff would at once recognize as justifying or excusing a “short pack” under the very terms of the contract. The answer must be read, as does his next letter in which he makes reference to hearing that weather conditions had improved, as indicating that damage to the crop was what he had in mind in his suggestion about meeting defendant’s situation “in reasonable fashion.” Very clearly it cannot be construed as an acquiescence in any suggestion which may be gathered from defendant’s letters that the latter was relying on the trouble with its machinery as justifying a “short pack.”

In construing acts or expressions of the kind relied on as constituting a construction by the parties of a written contract at variance with the

ordinary import of its terms, it is a cardinal rule that "It ought to appear with reasonable certainty that they were acts of both parties done with knowledge and in view of a purpose at least consistent with that to which they are now sought to be applied." *Sternbergh vs. Brock*, 225 Pa. 279, 287. Here the only information plaintiff has as to conditions confronting the defendant was what those conditions were represented to be by the latter and as to which, as we have seen, the failure of the crop was at least exaggerated. In this respect, therefore, the plaintiff is entitled to rely on the terms of the contract as written.

The further consideration urged by counsel as to the construction to be put upon the contract have not been overlooked but are regarded as inapplicable to its express terms.

The contract price, delivered by defendant f. o. b. cars San Francisco, was Seven Dollars (\$7.00) per case and it is stipulated that the market price at the time and place of delivery was Ten Dollars (\$10.00) a case. In view of the foregoing considerations, [182—147] plaintiff should have judgment in accord with those figures based upon a delivery of Eighty per cent (80%) of the quantity contracted for, less the quantity already delivered, and for its costs.

Judgment may be entered accordingly.

Thereafter judgment was entered in accordance with the said written decision, to which decision and judgment the defendant duly excepted, and

hereby designates said exception as Defendant's Exception No. 6.

DEFENDANT'S EXCEPTION No. 1.

And the defendant does hereby except to the ruling of the Court set forth in the foregoing record sustaining an objection to the following question propounded to the witness Victor V. Greco, namely: "Was the fact that Salsa De Pomodoro had never been produced in the United States, and that it was in its experimental stage in any way discussed between you and Mr. Pastene?" To which ruling the defendant duly excepted.

DEFENDANT'S EXCEPTION No. 2.

And the defendant does hereby except to the ruling of the Court sustaining an objection to the following question propounded to the witness Milton M. Berne: "Now, I will ask you the question as an expert in the matter: Assuming that a contract had been entered into by one of the parties to this action for production of a product known as Salsa De Pomodoro, which was a domestic product, was a product which had not theretofore been manufactured in America, and the party agreeing to deliver the goods for the first time installed machinery for its manufacture which had theretofore never been used for that purpose and with competent and skilfull and capable engineers operated it as skilfully as you could during the period of the season and was unable on account of the choking up to produce the required amount for his delivery, [183—148] would that be accepted by the trade as a justifiable reason for prorating de-

livery of the short pack?" To which ruling the defendant duly excepted.

DEFENDANT'S EXCEPTION No. 3.

And the defendant does hereby except to the ruling of the Court in overruling the defendant's objection to the introduction in evidence by the plaintiff of a tabulation showing the acres, tons and tons per acre of tomatoes from 1916 to 1918 prepared by the California Packing Corporation and the California Fruit Cannery Association, to which ruling the defendant duly excepted.

DEFENDANT'S EXCEPTION No. 4.

And the defendant does hereby except to the ruling of the Court sustaining an objection to the following question asked of the witness R. W. Crary, namely: "Assuming that a canner engages to deliver a given quantity of goods but through unforeseen difficulties with his machinery notwithstanding his efforts, he is unable to produce the quantity which he agrees to deliver, state whether or not the trade recognizes that as a justifiable reason for a short pack and a *pro rata* delivery?" To which ruling defendant duly excepted.

DEFENDANT'S EXCEPTION No. 5.

And the defendant does hereby except to the ruling of the Court striking out the answer of the witness R. W. Crary to the question: "What circumstances justifying a short pack would be incorporated under the common acceptance of the trade term 'or other circumstances beyond the packer's control'?" To which ruling defendant duly excepted.

DEFENDANT'S EXCEPTION No. 6.

And the defendant does hereby except to the decision and findings in the nature of a decision filed by Honorable W. C. Van [184—149] Fleet, District Judge in the above-entitled action, in the following particulars:

(a) The Court erred in failing to sustain the defense that there was a failure of crops and that such failure of crops was sufficient to justify the defendant in delivering only a short pack under the terms of its contract;

(b) The Court erred in finding against the defendant's contention that the early rains and frosts damaged the crops to such an extent as to make it impossible to deliver other than a short pack to the plaintiff;

(c) The Court erred in holding and finding that the burden was upon the defendant under its contract to secure tomatoes grown in other sections than the Santa Clara Valley and requiring the defendant to purchase tomatoes regardless of location;

(d) The Court erred in finding and holding that the burden was upon defendant to show that fruit for the purposes of fulfilling the contract could not have been secured in other parts of the State than the particular locality in which the cannery of the defendant was located;

(e) The Court erred in fact and in law in holding and finding that the evidence failed to disclose an effort on the part of the defendant to secure canning tomatoes in sections other than the Santa Clara Valley;

(f) The Court erred in holding and finding that the defendant was justified in abating his contract only to the extent of 20% from a full delivery;

(g) The Court erred in holding and finding that the phrase “circumstances beyond its control” did not include circumstances preventing the defendant from fulfilling his contract in terms;

(h) The Court erred in finding that there was no custom [185—150] making a failure under the circumstances asserted by the defendant and shown by the evidence to be within a custom of the trade recognizing the right to deliver a short pack;

(i) The Court erred in holding and finding that nothing is regarded by the trade as justifying a short pack other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character;

(j) The Court erred in holding and finding that the evidence did not sustain the contention that the parties in their dealings have given the contract the construction contended for by defendant;

(k) The Court erred in holding and finding that the plaintiff in his correspondence had not waived objections to the delivery of a short pack and had recognized the impossibility of the defendant delivering in full under the contract;

(l) The Court erred in holding and finding that it was possible for the defendant to have procured canning fruit in other localities than those adjacent to the cannery in view of the uncontradicted evidence that fruit for the peculiar product must be

secured in the immediate vicinity and be immediately manufactured when picked;

(m) The Court erred in holding and finding that the plaintiff in its correspondence, in which it stated, "If you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you," did not have a reference to the conditions relating to machinery and did not intend by such correspondence to waive the delivery of a short pack;

(n) The Court erred in holding and finding that the defendant [186—151] did not deliver the full *pro rata* to the plaintiff to which plaintiff was entitled;

(o) The Court erred in holding that the correspondence of the plaintiff was not in effect an acknowledgment of the necessity for a short pack on the part of the defendant;

(p) The Court erred in holding and finding that the plaintiff's correspondence and letters acknowledging letters from the defendant did not constitute an acquiescence in the delivery of a short pack by the defendant and the necessity therefor;

(q) The Court erred in holding and finding that the plaintiff was entitled to a judgment based upon a delivery of 80% of the quantity contracted for, less the quantity already delivered, and for its costs.

In each of the foregoing specifications of error in the rulings and the decision of the Court the defendant hereby notes an exception.

Order Settling and Allowing Bill of Exceptions.

I, the undersigned, Judge of the District Court of the United States, who presided at the trial of the above-entitled action, do hereby certify that the foregoing bill of exceptions, having been presented by the defendant within the time allowed by law therefor, is a true and correct copy of the proceedings had at the trial of said action, and I do hereby settle and allow the same and order that the said Bill be filed with the clerk of the court.

Dated: June 20, 1921.

(Sgd.) WM. C. VAN FLEET,
District Judge. [187—152]

Stipulation for Allowance of Bill of Exceptions.

It is hereby stipulated and agreed that the foregoing bill of exceptions was presented by defendant within the time allowed by law therefor, that the same is a true and correct copy of the proceedings had at the trial of the above-entitled action, and that the same may be certified, allowed and settled as the bill of exceptions in the above-entitled action as provided by law and the practice of this court.

THOMAS, BEEDY & LANAGAN,
Attorney for Plaintiff.
JOHN L. McNAB,
C. C. COOLIDGE,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 20, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [188—
153]

(Title of Court and Cause).

Assignment of Errors.

Comes now the defendant above named and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled action, from the judgment made by this Honorable Court on the 30th day of August, 1920:

I.

That the above-named District Court erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause.

II.

That the above-named District Court erred in rendering judgment in said action in favor of the plaintiff and respondent and against the defendant and appellant.

III.

That the above-named District Court erred in sustaining an objection to the following question propounded to the witness Victor V. Greco, namely:

“Was the fact that Salsa De Pomodoro had never been produced in the United States and that it was in its experimental stage in any way discussed between you and Mr. Pastene?”

which ruling is designated in the bill of exceptions herein, as Defendant's Exception No. 1.

IV.

That the said District Court erred in sustaining

an objection to the following question propounded to the witness Milton M. Berne:

“Now, I will ask you the question as an expert in the matter: Assuming that a contract had been entered into by one of the parties to this action for the production of a product known as Salsa De Pomodoro, which was a domestic product, was a product which had not theretofore been manufactured in America, and the party agreeing to deliver the goods for the first time installed machinery for its manufacture which had theretofore never been [189] used for that purpose and with competent and skillful and capable engineers operated it as skillfully as you could during the period of the season and was unable on account of the choking up to produce the required amount for his delivery, would that be accepted by the trade as a justifiable reason for prorating delivery of the short pack?”

which ruling is designated in the bill of exceptions herein as Defendant's Exception No. 2.

V.

That the said District Court erred in overruling defendant's objection to the introduction in evidence by the plaintiff of a tabulation showing the acres, tons and tons per acre of tomatoes from 1916 to 1918, prepared by the California Packing Corporation and the California Fruit Canners Association, by which said ruling is designated in the bill of exceptions herein as Defendant's Exception No. 3.

VI.

That the said District Court erred in sustaining an objection to the following question asked of the witness R. W. Crary, namely:

“Assuming that a canner engages to deliver a given quantity of goods but through unforeseen difficulties with his machinery notwithstanding his efforts, he is unable to produce the quantity which he agrees to deliver, state whether or not the trade recognizes that as a justifiable reason for a short pack and a *pro rata* delivery?”

which said ruling is designated in the bill of exceptions herein as Defendant's Exception No. 4.

VII.

That the said District Court erred in striking out the answer of the witness R. W. Crary to the question:

“What circumstances justifying a short pack would be incorporated under the common acceptance of the trade term ‘or other circumstances beyond the packer's control’?”

which said ruling is designated in the bill of exceptions as Defendant's Exception No. 5. [190]

VIII.

That the said District Court erred in rendering its decision in favor of the plaintiff and against the defendant for the reason that said decision is against law.

IX.

That the said District Court erred in rendering

judgment in favor of the plaintiff and against the defendant for the reason that said judgment is contrary to the evidence and the law applicable thereto.

X.

That the said District Court erred in making its decision and findings in the nature of a decision filed by the Honorable W. C. Van Fleet, District Judge in the above-entitled action in the following particulars:

(a) The Court erred in failing to sustain the defense that there was a failure of crops and that such failure of crops was sufficient to justify the defendant in delivering only a short pack under the terms of its contract.

(b) The Court erred in finding against the defendant's contention that the early rains and frosts damaged the crops to such an extent as to make it impossible to deliver other than a short pack to the plaintiff.

(c) The Court erred in holding and finding that the burden was upon the defendant under its contract to secure tomatoes grown in other sections than the Santa Clara Valley and requiring the defendant to purchase tomatoes regardless of location.

(d) The Court erred in finding and holding that the burden was upon defendant to show that fruit for the purposes of fulfilling the contract could not have been secured in other parts of the State than the particular locality in which the cannery of the defendant was located. [191]

(e) The Court erred in fact and in law in holding and finding that the evidence failed to disclose an effort on the part of the defendant to secure canning tomatoes in sections other than the Santa Clara Valley.

(f) The Court erred in holding and finding that the defendant was justified in abating his contract only to the extent of 20% from a full delivery.

(g) The Court erred in holding and finding that the phrase "circumstances beyond its control" did not include circumstances preventing the defendant from fulfilling his contract in terms.

(h) The Court erred in finding that there was no custom making a failure under the circumstances asserted by the defendant and shown by the evidence to be within a custom of the trade recognizing the right to deliver a short pack.

(i) The Court erred in holding and finding that nothing is regarded by the trade as justifying a short pack other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character.

(j) The Court erred in holding and finding that the evidence did not sustain the contention that the parties in their dealings have given the contract the construction contended for by defendant.

(k) The Court erred in holding and finding that the plaintiff in his correspondence had not

waived objections to the delivery of a short pack and had recognized the impossibilities of the defendant delivering in full under the contract.

(l) The Court erred in holding and finding that it was possible for the defendant to have procured canning fruit in other localities than those adjacent to the cannery in view of the uncontradicted evidence that fruit for the peculiar product [192] must be secured in the immediate vicinity and be immediately manufactured when picked.

(m) The Court erred in holding and finding that the plaintiff in its correspondence, in which it stated, "If you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you," did not have a reference to the conditions relating to machinery and did not intend by such correspondence to waive the delivery of a short pack.

(n) The Court erred in holding and finding that the defendant did not deliver the full *pro rata* to the plaintiff to which plaintiff was entitled.

(o) The Court erred in holding that the correspondence of the plaintiff was not in effect an acknowledgment of the necessity for a short pack on the part of the defendant.

(p) The Court erred in holding and finding that the plaintiff's correspondence and letters acknowledging letters from the defendant did not constitute an acquiescence in the delivery of a short pack by the defendant and the necessity therefor.

(q) The Court erred in holding and finding that the plaintiff was entitled to a judgment based upon a delivery of 80% of the quantity contracted for, less the quantity already delivered, and for its costs.

to which ruling, decision and findings in the nature of a decision as found by said Judge, defendant excepts and which said ruling is designated in the bill of exceptions herein as Defendant's Exception No. 6.

WHEREFORE said defendant prays that the judgment of the District Court of the United States in and for the Northern [193] District of California, Second Division, be reversed, and that said cause may be remanded to the United States District Court in and for the Northern District of California, with instructions to said Court to enter for defendant.

JOHN L. McNAB,

C. C. COOLIDGE,

Attorneys for Defendant.

Due service and receipt of a copy of the within assignment of errors is hereby admitted this 19th day of February, 1921.

THOMAS, BEEDY & LANAGAN,

Attorneys for Plff.

[Endorsed]: Filed Feb. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [194]

(Title of Court and Cause.)

Petition for Writ of Error.

Greco Canning Company, a corporation organized and existing under and by virtue of the laws of the State of California, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the Court and the judgment entered herein on the 30th day of August, 1920, comes now by Messrs. John L. McNab and C. C. Coolidge, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that a citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules in such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

JOHN L. McNAB,
C. C. COOLIDGE,
Attorneys for Defendant.

Due service and receipt of a copy of the within petition is hereby admitted this 19th day of Feb. 1921.

THOMAS, BEEDY & LANAGAN,
Attys. for Plff.

[Endorsed]: Filed Feb. 21, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [195]

(Title of Court and Cause.)

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

Upon motion of John L. McNab and C. C. Coolidge, attorneys for the above-named defendant, and upon filing a petition for a writ of error and assignment of errors:

IT IS ORDERED that the writ of error be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein on the 30th day of August, 1920, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the amount of the bond on said writ of error be, and it is hereby, fixed at the sum of \$300.00.

Dated: February 21, 1921.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Filed Feb. 21, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [196]

No. 30321-21.

\$300.00.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY.

BALTIMORE, MARYLAND.

In the District Court of the United States, in and
for the Ninth Judicial Circuit, Northern Dis-
trict of California, Second Division.

P. PASTENE & CO., INCORPORATED, a Cor-
poration,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
that we, Greco Canning Co., a corporation, as prin-
cipal, and United States Fidelity and Guaranty
Company, a corporation, having its principal place
of business in the city of Baltimore, State of Mary-
land, and having a paid-up capital of Four Million
Five Hundred Thousand Dollars (\$4,500,000), duly
incorporated under the laws of the State of Mary-
land, for the purpose of making, guaranteeing and
becoming surety on bonds and undertakings, and
having complied with all the requirements of the
laws of the State of California and United States

of America respecting such corporations, are held and firmly bound unto plaintiff in the sum of Three Hundred Dollars (\$300.00), lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this 23d day of February, 1921.

WHEREAS, the above-named defendant has prosecuted a writ of [197] error to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the judgment of the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division, in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

GRECO CANNING CO.

By BYRON COLEMAN,

Principal.

UNITED STATES FIDELITY AND
GUARANTY COMPANY.

[Seal]

By HENRY V. D. JOHNS,

Attorney in Fact.

By ERNEST W. SWINGLEY,

Attorney in Fact.

(Premium charged for this bond is \$10.00 per annum.)

Approved as to form and sufficiency of sureties.

FRANK H. RUDKIN,
U. S. District Judge.

[Endorsed]: Filed Feb. 26, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [198]

(Title of Court and Cause.)

Praeipie for Transcript of Record on Writ of Error.
To Walter B. Maling, Clerk of the District Court
Above Named:

YOU WILL PLEASE PREPARE the record
for the transcript to be printed in the above-en-
titled action upon writ of error to the United States
Circuit Court of Appeals for the Ninth Circuit and
incorporate therein the following papers:

1. Complaint.
2. Demurrer to complaint.
3. Answer of defendant.
4. Opinion of the District Judge.
5. Judgment.
6. Stipulation waiving jury.
7. Bill of exceptions.
8. Petition for writ of error.
9. Order allowing writ of error and fixing
amount of bond.
10. Writ of error.
11. Bond.

12. Assignment of errors.
13. Citation on writ of error.

JOHN L. McNAB,
C. C. COOLIDGE,

Attorneys for Plaintiff in Error.

Receipt of a copy of the within praecipe is hereby admitted this 26th day of Feb., 1921.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plff.

[Endorsed]: Filed Feb. 28, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [199]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,076.

P. PASTENE & CO., INCORPORATED, a Corporation,
Plaintiff,

Plaintiff,

vs.

GRECO CANNING CO., a Corporation,
Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred ninety-nine (199) pages, numbered from 1 to 199, inclusive, to be full, true and correct copies of

the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$87.75; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 12th day of August, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [200]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between P. Pastene & Co., Incorporated, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Greco

Canning Co., a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 26th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

FRANK H. RUDKIN,
United States District Judge. [201]

Receipt of a copy of the within writ of error is hereby admitted this 26th day of Feb. 1921.

THOMAS, BEEDY & LANAGAN,
Attorneys for Pltf.

[Endorsed]. No. 16,076. United States District Court for the Northern District of California. Greco Canning Co., a Corporation, Plaintiff in Error, vs. P. Pastene & Co., Incorporated, a Corporation, Defendant in Error. Writ of Error. Filed Feb. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [202]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to P. Pastene & Co., Incorporated, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Greco Canning Co., a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Northern District of California, this 26th day of February, A. D. 1921.

FRANK H. RUDKIN,

United States District Judge. [203]

Due service and receipt of a copy of the within citation is hereby admitted this 26th day of Feb., 1921.

THOMAS, BEEDY & LANAGAN,

Attorneys for Pltf.

[Endorsed]: No. 16,076. United States District Court for the Northern District of California. Greco Canning Co., a Corporation, Plaintiff in Error, vs. P. Pastene & Co., Incorporated, a Corporation, Defendant in Error. Citation on Writ of Error. Filed Feb. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3750. United States Circuit Court of Appeals for the Ninth Circuit. Greco Canning Company, a Corporation, Plaintiff in Error, vs. P. Pastene & Company, Incorporated, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed August 12, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. —

GRECO CANNING CO., a Corporation,
Appellant,

vs.

P. PASTENE & CO., INCORPORATED, a Corpo-
ration,

Appellee.

**Order Extending Time to and Including April 28,
1921, to File Record and Docket Cause.**

GOOD CAUSE BEING SHOWN, it is hereby
ORDERED that the appellant in the above-entitled
cause may have to and including April 28th, 1921,
within which to file the record on appeal and docket
the cause in the United States Circuit Court of Ap-
peals for the Ninth Circuit.

Dated March 24th, 1921.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. 3750. United States Circuit
Court of Appeals for the Ninth Circuit. Greco
Canning Co., a Corporation, Appellant, vs. P. Pas-
tene & Co., Incorporated, a Corporation, Appellee.
Order Extending Time to Docket Cause. Filed
Mar. 25, 1921. F. D. Monckton, Clerk. Refiled
Aug. 12, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. —

GRECO CANNING CO., a Corporation,
Appellant,

vs.

P. PASTENE & CO., INCORPORATED, a Corpo-
ration,

Appellee.

**Order Extending Time to and Including May 28,
1921, to File Record and Docket Cause.**

GOOD CAUSE BEING SHOWN, it is hereby
ORDERED that the appellant in the above-entitled
cause may have to and including May 28th, 1921,
within which to file the record on appeal and docket
the cause in the United States Circuit Court of Ap-
peals for the Ninth Circuit.

Dated April 27, 1921.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. 3750. United States Circuit
Court of Appeals for the Ninth Circuit. Greco
Canning Co., a Corporation, Appellant, vs. P. Pas-
tene & Co., Incorporated, a Corporation, Appellee.
Order Under Subdivision 1 to Rule 16 Enlarging
Time to and Including May 28, 1921, to File Record
and Docket Cause. Filed Apr. 27, 1921. F. D.
Monckton, Clerk. Refiled Aug. 12, 1921. F. D.
Monckton, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. —

GRECO CANNING CO., a Corporation,
Appellant,

vs.

P. PASTENE & CO., INCORPORATED, a Corpo-
ration,
Appellee.

**Order Extending Time to and Including June 28,
1921, to File Record and Docket Cause.**

GOOD CAUSE BEING SHOWN, it is hereby
ORDERED that the appellant in the above-entitled
action may have to and including June 28th, 1921,
within which to file the record on appeal and docket
the cause in the United States Circuit Court of Ap-
peals for the Ninth Circuit.

Dated May 28, 1921.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. 3750. United States Circuit
Court of Appeals for the Ninth Circuit. Greco
Canning Co., a Corporation, Appellant, vs. P. Pas-
tene & Co., Incorporated, a Corporation, Appellee.
Order Extending Time to Docket Cause. Filed May
28, 1921. F. D. Monckton, Clerk. Refiled Aug. 12,
1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. —

GRECO CANNING CO., a Corporation,
Appellant,

vs.

P. PASTENE & CO., INCORPORATED, a Corporation,
Appellee.

**Stipulation and Order Extending Time to and
Including July 28, 1921, to File Record and
Docket Cause.**

It is hereby stipulated that the time for the docketing the above-entitled cause in the Circuit Court of Appeals may be extended to and including the 28th day of July, 1921, and consent is hereby given to the making of an order extending the time for that time.

WM. W. MORROW,
Judge.

ORDER.

It is hereby stipulated on behalf of plaintiff that the Court may make an order extending the time to docket the above-entitled case in the Circuit Court of Appeals thirty days from date.

THOMAS, BEEDY & LANAGAN,
Attorneys for Appellee.

[Endorsed]: No. 3750. United States Circuit Court of Appeals for the Ninth Circuit. Greco Canning Co., a Corporation, Appellant vs. P. Pas-

tene & Co., Incorporated, a Corporation, Appellee.
Stipulation. Filed Jun. 28, 1921. F. D. Monckton,
Clerk. Refiled Aug. 12, 1921. F. D. Monckton,
Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

GRECO CANNING CO., a Corporation,
Plaintiff in Error,
vs.

P. PASTENE & CO., INCORPORATED, a Corpo-
ration,
Defendant in Error.

**Order Extending Time to and Including August 26,
1921, to File Record and Docket Cause.**

GOOD CAUSE BEING SHOWN, it is hereby
ORDERED that the plaintiff in error may have to
and including August 26, 1921, within which to file
the record on writ of error and to docket the cause
in the United States Circuit Court of Appeals for
the Ninth Circuit.

Dated July 26, 1921.

FRANK H. RUDKIN,
U. S. Circuit Judge.

[Endorsed]: No. 3750. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Subdivision 1 of Rule 16 Enlarging Time to
and Including Aug. 26, 1921, to File Record and
Docket Cause. Filed Jul. 26, 1921. F. D. Monck-
ton, Clerk. Refiled Aug. 12, 1921. F. D. Monck-
ton, Clerk.